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Private Control over Access to Public Law: The Perplexing Federal Regulatory Use of Private Standards

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PRIVATE CONTROL OVER ACCESS TO THE LAW: THE PERPLEXING FEDERAL REGULATORY USE OF PRIVATE STANDARDS

Nina A. Mendelson*

To save resources and build on private expertise, federal agencies have incorporated privately drafted standards into thousands of federal regulations—but only by “reference.” These standards range widely, subsuming safety, benefits, and testing standards. An individual who seeks access to this binding law generally cannot freely read it online or in a governmental depository library, as she can the U.S. Code or the Code of Federal Regulations. Instead, she generally must pay a significant fee to the drafting organization, or else she must travel to Washington, D.C., to the Office of the Federal Register’s reading room.

This law, under largely private control, is not formally “secret,” but it is expensive and difficult to find. It raises the question of what underlies the intuition that law, in a democracy, needs to be readily, publicly available. Previous analyses of the need for publicity have focused almost wholly on the need of regulated entities for notice of their obligations. This Article assesses several other considerations, including notice to regulatory beneficiaries, such as Medicare recipients, consumers of dangerous products, and neighbors of natural gas pipelines. Ready public access to the law is also critical to ensuring that federal agencies are meaningfully accountable for their decisions, through both internal and external mechanisms, including voting, political oversight, and agency procedures. The need for ready public access is at least as strong in this collaborative governance setting as when agencies act alone. Finally, expressive harm—a message inconsistent with core democratic values—is likely to flow from governmental adoption of regulatory law that is, in contrast to American law in general, harder to find and costly to access. Full assessment of the importance of public access to law both strengthens the case for reform of access barriers to incorporated-by-reference rules and limits the range of acceptable reform measures.

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INTRODUCTION

The American democratic commitment to public law is longstanding. As James Madison wrote in 1822, “A popular Government, without popular information . . . is but a Prologue to a Farce or a Tragedy; or, perhaps both.”¹ And Justice Scalia echoed these sentiments nearly two centuries later: “Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes.”² Scalia contrasted the “nasty practice[]” of an early Roman emperor.³ Emperor Caligula reportedly faced public outcry after he enacted laws imposing severe penalties and had them inscribed in “exceedingly small letters on a tablet which he then hung up in a high place, so that . . . many through ignorance . . . should lay themselves liable to the penalties provided.”⁴

And in the 1930s, Harvard professor Erwin Griswold complained about the enormous numbers of federal regulations, freshly issued by New Deal agencies, that were obscurely published in “separate paper pamphlets” or even on a “single sheet of paper.”⁵ Finding these binding legal rules was

1. Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 THE WRITINGS OF JAMES MADISON 103, 103 (Gaillard Hunt ed., 1910).

2. Antonin Scalia, Essay, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989); see also Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 WM. & MARY BILL RTS. J. 497, 497 (2013) (quoting WORLD LEGAL INFO. INST., http://www.worldlii.org/worldlii/declaration/montreal_en.html (last visited Dec. 12, 2013)).

3. Scalia, *supra* note 2, at 1179 (misidentifying the emperor as Nero).

4. See CASSIUS DIO, ROMAN HISTORY 357 (Earnest Cary trans., Harvard Univ. Press, 1914–1927), available at http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Cassius_Dio/59*.html, cited in WILLIAM BLACKSTONE, COMMENTARIES *46.

5. Erwin Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198, 294 (1934). Griswold suggests that the total amount of “law” issued during the first year of the National Recovery Administration exceeded 10,000 pages, “scattered among 5991 press releases during this period.” *Id.* at 199. These laws included hundreds of “industry” codes drafted under the auspices of the National Industrial Recovery Act. See Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1179 (2013).

difficult, leading to “chaos” and an “intolerable” situation.⁶ Congress responded, requiring that agencies publish all rules in the Federal Register and in the Code of Federal Regulations (“CFR”).⁷ Currently, recent federal public laws, the U.S. Code, the Federal Register, and the CFR are all freely available online as well as in governmental depository libraries.⁸

Despite these repeated public commitments to transparency, we seem to be returning to a situation where thousands of federal regulatory standards are increasingly difficult to locate. The text of these standards appears in neither the Federal Register nor the CFR. They are privately drafted standards that a federal agency has incorporated only by “reference” into the CFR, and they are generally available only on request to a private organization and payment of a nontrivial price.

The CFR today contains nearly 9,500 “incorporations by reference” of standards, often referred to as “IBR” rules or standards. Some IBR rules incorporate material published by other agencies or state entities,⁹ but many incorporate privately drafted standards from so-called “standards development organizations” or “SDOs,” organizations ranging from the American Society for Testing and Materials (“ASTM”) to the Society for Automotive Engineers and the American Petroleum Institute (“API”).¹⁰ Agency use of private standards is likely to grow because, since the 1990s, both executive branch and congressional policies have officially encouraged it. Indeed, if an

6. Griswold, *supra* note 5, at 204 (“chaos”); *id.* at 205 (“intolerable”).

7. Note, *The Federal Register and the Code of Federal Regulations—A Reappraisal*, 80 HARV. L. REV. 439, 440–41 (1966); *see also* Griswold, *supra* note 5, at 205.

8. *E.g.*, Thomas, LIBRARY OF CONG., <http://thomas.loc.gov> (last visited Sept. 29, 2013) (access to legislative materials); *Opinions*, SUPREME COURT OF THE U.S., <http://www.supremecourt.gov/opinions/opinions.aspx> (last visited Sept. 29, 2013) (Supreme Court opinions before 1882 and after 1991); *Federal Digital System*, U.S. GOV’T PRINTING OFFICE, <http://www.gpo.gov/fdsys> (last visited Sept. 29, 2013) (providing access, back to the mid-1990s, to the CFR, Federal Register, public and private laws, U.S. Code, and some federal court opinions). Private services, such as West Publishing, also provide access for a price, although their assertion of copyright depends on supplying added content, such as West’s headnotes system. *Callaghan v. Myers*, 128 U.S. 617, 647 (1888). Federal court opinions are also freely available online. *E.g.*, PACER, <http://www.pacer.gov> (last visited Sept. 29, 2013) (free access to federal judicial opinions; per-page charges for access to other court materials); SUPREME COURT OF THE U.S., *supra*, (Supreme Court opinions); U.S. GOV’T & PRINTING OFFICE, *supra*, (access to some federal court opinions); *see also Electronic Public Access Fee Schedule*, PACER (Apr. 1, 2013), http://www.pacer.gov/documents/epa_feesched.pdf. PACER’s imposition of fees for electronic access has been criticized. *See infra* text accompanying note 342.

9. *E.g.*, 7 C.F.R. § 802.0 (2013) (incorporating National Institute of Standards and Technology Handbook 44 on weighing and measuring devices); 40 C.F.R. § 52.742(d) (2012) (incorporating provisions of Illinois Administrative Code). Some materials incorporated by reference include documents too voluminous to reprint, such as the Post Office manual with zip codes, incorporated by reference in its rulemaking on the “ZIP + 4” nine-digit zip code. *See Amendments to ZIP Code Provisions to Explain the ZIP + 4 Code*, 46 Fed. Reg. 33,249, 33,252 (June 29, 1981).

10. Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL’Y 131, 150 (2013) (stating that the database included 9,475 incorporations by reference of standards in 2012 and listing the top ten suppliers of private IBR standards).

agency develops “government-unique” standards when a “consensus” private standard exists, the agency must explain why it did so.¹¹

A reader perusing worker-safety requirements in the CFR may note that contractors handling pressure systems must comply with the American Society for Mechanical Engineers (“ASME”)’s “Manual for Determining Remaining Strength of Corroded Pipelines,”¹² among other standards. To access these standards, the CFR refers the reader directly to the ASME at its New Jersey location or at its website.¹³ The reader’s only alternative is to write for an appointment at the Office of the Federal Register (“OFR”)’s reading room in downtown Washington, D.C.¹⁴ On the internet, the cited standard is available from a third-party seller for \$68; despite the CFR’s promise, ASME itself apparently no longer provides the standard.¹⁵

Private standards like these are used to define the content of federal rules in an extraordinarily wide variety of subject areas, ranging from toy safety to Medicare prescription-drug-dispensing requirements to nuclear power plant operation.¹⁶ Some IBR standards might be colloquially characterized as “technical,” including those establishing standard-measurement protocols¹⁷ or coordination-type standards. Coordination standards include, for example, the National Fire Protection Association’s “standard coupling” compatibility standard, developed around 1910 to ensure that fire hoses can be properly attached to fire hydrants, no matter the city of the originating

11. See *infra* text accompanying notes 60–64 (discussing Circular No. A-119 and National Technology Transfer and Advancement Act of 1995); see also *infra* notes 66–70 (the OFR is proposing to reduce restrictions on agency incorporations by reference).

12. 10 C.F.R. pt. 851, App. A, sec. 4(b)(2)(x) (2013).

13. See *id.* § 851.27(a)(2)(vi).

14. The CFR notes that a reader may contact the National Archives and Records Administration to view IBR standards and provides a phone number and website. *Id.* § 851.27(a)(2)(i). As of May 2013, the reader is automatically referred to *Code of Federal Regulations*, NAT’L ARCHIVES, <http://www.archives.gov/federal-register/cfr/index.html> (last visited Sept. 29, 2013). At that website, if one clicks on “incorporation by reference” in the left-hand margin, one is referred to another page containing instructions for making an appointment at the OFR’s Washington, D.C., location. *Incorporation by Reference*, NAT’L ARCHIVES, <http://www.archives.gov/federal-register/cfr/ibr-locations.html> (last visited Sept. 29, 2013).

15. *Manual for Determining the Remaining Strength of Corroded Pipelines*, TECHSTREET STORE, <http://www.techstreet.com/products/1842873> (last visited Sept. 29, 2013). The cited version of the standard, from 1991, no longer appears to be directly available from ASME. See *Standards*, AM. SOC’Y OF MECH. ENG’RS, http://www.asme.org/shop/standards?cm_re=Home_-_GlobalHeader_-_Standards#searchBy=Manual%20for%20Determining%20the%20Remaining%20Strength%20of%20Corroded%20Pipelines (last visited Sept. 29, 2013).

16. 10 C.F.R. § 34.20(a)(1) (2013) (incorporating American National Standards Institute (“ANSI”) performance standards for industrial radiography equipment); 16 C.F.R. §§ 1505.5–.6 (2013) (incorporating ANSI and National Fire Protection Association (“NFPA”) requirements for electrically operated toys, including toys with heating elements); 42 C.F.R. § 423.160(b)(2) (2012) (incorporating National Council for Prescription Drug Programs SCRIPT Standard).

17. E.g., 7 C.F.R. § 1728.98(a)(2) (2013) (incorporating Rural Electrification Administration and Rural Utilities Service requirements for “Pole Top Pins”); 40 C.F.R. § 52.741(a)(3) (2012) (incorporating ASTM vapor pressure measurement methods to define “heavy liquid”).

fire truck.¹⁸ Even coordination standards are not policy-neutral, since they can clearly affect industry structure and market prices.¹⁹

But agencies also expressly use IBR standards to define policy, including substantive standards for health and safety.²⁰ For example, federal rules require employers who hire teenagers to load scrap paper into balers, a particularly hazardous occupation for minors in the Department of Labor's view, to ensure that the machines conform to incorporated-by-reference American National Standards Institute ("ANSI") safety standards.²¹ The relevant standards are no longer available from ANSI at all but can be purchased from a third-party seller for \$50.40; ANSI's revision costs \$150.²² Other private

18. See Tyler R.T. Wolf, Note, *Existing in a Legal Limbo: The Precarious Legal Position of Standards-Development Organizations*, 65 WASH. & LEE L. REV. 807, 808–09 & n.11 (2008) (describing the challenges of fighting fires prior to the development of uniform standards based on a plan of the NFPA).

19. E.g., Robert W. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329, 1373 (1978) (suggesting that some SDO standards were chosen to maximize the competitive advantage of one segment of industry over another); see also Comment of the Modification & Replacement Parts Ass'n 14 (OFR Docket June 1, 2012), available at <http://www.regulations.gov/contentStreamer?objectId=09000064810266b8&disposition=attachment&contentType=pdf> ("Standard-setting organizations or companies may attempt to lock out their competitors via incorporated standards that restrict processes or allowable materials or practices.").

This and several other comments cited throughout this Article come from an OFR online docket of public comments. Comments were filed in response to the OFR's request for comments on a petition seeking revision of incorporation by reference rules. (I am a signatory to the petition.) See *infra* text accompanying note 39 (describing petition). The OFR's request for comments appears at Incorporation by Reference, 77 Fed. Reg. 11,414 (announcement of petition for rulemaking and request for comments, Feb. 27, 2012), available at <https://www.federalregister.gov/articles/2012/02/27/2012-4399/incorporation-by-reference> (reprinting petition); *Docket Folder Summary*, REGULATIONS.GOV, <http://www.regulations.gov/#!docketDetail;D=NARA-12-0002> (last visited Nov. 12, 2013).

20. E.g., 10 C.F.R. § 851.23(a)(9) (2013) (requiring contractors to comply with the following "safety and health" standards, incorporating by reference the 2005 American Conference of Governmental Industrial Hygienists ("ACGIH")'s "Threshold Limit Values for Chemical Substances and Physical Agents and Biological Exposure Indices"). Note that these limits now appear to be unavailable on the ACGIH website. See ACGIH, <http://www.acgih.org> (last visited Sept. 29, 2013).

21. E.g., 29 C.F.R. § 570.63(a) (2012) (finding operation of paper products machines to be "particularly hazardous for the employment of minors"); 29 C.F.R. § 570.63(c)(1) (2012) (nonetheless permitting sixteen- and seventeen-year-olds to load scrap paper balers that comply with specified "industry safety standard," ANSI Standard Z245.5-2008 or earlier).

22. ANSI Z245.5-2008, TECHSTREET STORE, <http://www.techstreet.com/products/1577288> (last visited Jan. 9, 2013). ANSI sells the 2013 version of the standard for \$150. See *eStandards Store*, ANSI, <http://webstore.ansi.org/RecordDetail.aspx?sku=ANSI+Z245.5-2013> (last visited Jan. 9, 2013). For another example, federal rules require a natural gas pipeline operator to implement a public awareness program according to the requirements of an API standard. 49 C.F.R. § 192.616 (2012) (incorporating API Recommended Practice 1162). That standard currently costs \$124. API RP 1162, TECHSTREET STORE, <http://www.techstreet.com/products/1757546> (last visited Sept. 29, 2013). As of April 2013, the API had made this standard available for free on a read-only basis, although access required the reader to waive any challenges to the API's copyright and acknowledge the API's ability to set a price or revoke access at any time. See *infra* note 33. To the API and the Transportation Department's credit,

standards are incorporated as an acceptable, although not exclusive, means of compliance with federal standards.²³

And private standards can also define the extent of available federal benefits. For example, Medicare Part D standards permit some coverage of pharmaceuticals dispensed for off-label uses, but only if the drug is listed as medically indicated in one of three private drug compendia.²⁴ As the API recently wrote in public comments, IBR standards can include “politically contentious permitting regulations that affect almost every industry.”²⁵

Meanwhile, although the Federal Register Act, as amended by the Freedom of Information Act (“FOIA”), broadly requires agencies to publish in the Federal Register “substantive rules of general applicability adopted as authorized by law,”²⁶ it includes an exception: “[M]atter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.”²⁷ The original idea behind this exception to Federal Register publication was to permit the government to save printing costs by allowing agencies to incorporate voluminous material published elsewhere,²⁸ such as rules freely available from other federal agencies or state agencies.

however, as of November 2013, a read-only copy of the standard can be accessed through a live link on the Department of Transportation’s website. See *Public Awareness Programs: API RP 1162*, U.S. DEP’T OF TRANSP., <https://primis.phmsa.dot.gov/comm/PublicAwareness/PARPI1162.htm> (last visited Nov. 12, 2013).

23. For example, Occupational Safety and Health Administration (“OSHA”) standards for the storage and handling of anhydrous ammonia permit fertilizer storage systems to be installed in compliance with either ANSI or Fertilizer Institute standards. See 29 C.F.R. § 1910.111(b)(1)(i) (2012). Federal accessibility requirements under fair housing laws provide a “safe harbor” if the housing complies with standards set by ANSI. See 42 U.S.C. § 3604(f)(4) (2006). As of August 2013, ANSI Standard 117.1, referenced in the law, cost \$40. *eStandards Store: ANSI A117.1-1986*, AM. NAT’L STANDARDS INST., <http://webstore.ansi.org/RecordDetail.aspx?sku=ANSI+A117.1-1986> (last visited Sept. 29, 2013).

24. HHS rules limit Medicare Part D coverage for a drug that is prescribed for a “medically accepted indication,” 42 C.F.R. § 423.100 (2012), defining that term with reference to three drug compendia mentioned in the statute. See 42 U.S.C. § 1396r-8(k)(6), (g)(1)(B)(i) (2006 & Supp. V 2011) (listing “American Hospital Formulary Service Drug Information,” “United States Pharmacopeia-Drug Information,” and “the DRUGDEX Information System”). District courts have disagreed about whether the agency’s limiting construction violates the statute, which authorizes coverage for “medically accepted indications,” “including” the examples provided in the statute. See, e.g., *Layzer v. Leavitt*, 770 F. Supp. 2d 579 (S.D.N.Y. 2011); *Nievod v. Sebellius* [sic], No. C11-4134 SBA, 2013 WL 503089 (N.D. Cal. Feb. 8, 2013).

25. Comment of David Miller, Director, Am. Petroleum Inst. 4 (OFR Docket June 1, 2012) [hereinafter Comment of Am. Petroleum Inst.], available at <http://www.regulations.gov/contentStreamer?objectId=0900006481025c0c&disposition=attachment&contentType=pdf> (arguing that the OFR should have no role in requiring free public access to IBR rules).

26. 5 U.S.C. § 552(a)(1)(D) (2012).

27. *Id.* § 552(a)(1).

28. See Bremer, *supra* note 10, at 142. As others have pointed out, with the advent of widespread internet access to the CFR and the Federal Register, the concern about printing costs has largely evaporated. See Strauss, *supra* note 2, at 523–24.

In the case of privately developed, but incorporated, standards, however, the agency generally refers the reading public to the SDO.²⁹ SDOs have, seemingly without exception, asserted copyright protection and an entitlement to charge a “purchase price” for access. Even when they provide some free, read-only access to the public, SDOs generally claim the option to revoke access or to charge for it.³⁰ Again, the reader’s alternative is to make an appointment at the OFR’s reading room in Washington, D.C. The reading room contains no photocopier.³¹

The payments that SDOs require typically significantly exceed the transaction costs of making a standard available, such as the copying costs.³² Many SDOs have stated that the fees they charge for standards purchases represent compensation for value and a source of income that helps pay for the development of the standards.³³ Prices that SDOs charge for a variety of

29. See, e.g., 49 C.F.R. § 192.7(c) (2010) (listing SDOs).

30. As of August 2013, ASTM International (formerly the ASTM) has opened a read-only reading room, purportedly for standards that have been incorporated into federal law. *Reading Room*, ASTM INT’L, <http://www.astm.org/READINGLIBRARY/index.html> (last visited Sept. 29, 2013) (“This is a free service where you can view and read ASTM safety standards incorporated in United States regulations.”). However, the coverage is spotty at best; searches in January 2013 revealed that the library appeared to exclude numerous ASTM standards incorporated by reference into federal regulations. Meanwhile, apart from granting a limited license to read the standards, ASTM asks readers to waive any challenges to its holding a full copyright, including a bar on “in any way exploit[ing]” the material “in whole or in part.” Cf. *ASTM License Agreement*, ASTM INT’L, available at http://www.astm.org/COPYRIGHT/Single_PDF_copyrightlicense_agreement.doc (last visited Sept. 29, 2013) (version as of Jan. 30, 2013, on file with author). As of this writing, API has also made some limited, read-only, free public access available to its federally cited standards, but it requires readers to sign an agreement “acknowledg[ing] that the content of the Online Document is copyrighted and owned by API and is protected by U.S. copyright law . . .” and reserving API’s rights to “suspend or discontinue providing the Online Document to you with or without cause and without notice.” *Government-Cited and Safety Documents*, API, http://publications.api.org/GocCited_Disclaimer.aspx (last visited Sept. 29, 2013). Research has identified the rare organization that does not charge for access to its standards, although the standards do include copyright notices. E.g., SNELL MEM’L FOUND., 1995 STANDARD FOR PROTECTIVE HEADGEAR (rev. 1998), available at <http://www.smf.org/standards/pdf/b95rev.pdf> (incorporated in 16 C.F.R. § 1203.53(a) (2013)).

31. *Incorporation by Reference*, NAT’L ARCHIVES, *supra* note 14. Standards are occasionally made available for inspection in agency regional offices. For example, the Department of Transportation also maintains a set of privately incorporated standards for inspection in its Washington, D.C., Office of Pipeline Safety. 49 C.F.R. § 192.7(b) (2012).

32. Cf. 5 U.S.C. § 552(a)(4)(A)(ii) (2012) (stating that under the FOIA, agencies may charge requesters transaction costs such as photocopying).

33. E.g., Comment of Am. Nat’l Standards Inst. 2 (OFR Docket May 31, 2012), available at <http://www.regulations.gov/contentStreamer?objectId=0900006481023751&disposition=attachment&contentType=pdf>; Comment of Eric P. Loewen, President, Am. Nuclear Soc’y 2 (OFR Docket Mar. 28, 2012), available at <http://www.regulations.gov/contentStreamer?objectId=0900006480fe4421&disposition=attachment&contentType=pdf> (“[O]ur staff, the editors, printing, and meeting room charges at hotels are not free during the development of standards, and so therefore it is not sustainable to provide industry standards for ‘free.’”); Comment of Jim Shannon, President, Nat’l Fire Protection Ass’n 1–2 (OFR Docket June 1, 2012),

IBR standards range from fifty to several thousand dollars for the prescription drug compendia incorporated in Medicare rules. The least expensive of these compendia costs \$349, and one reportedly costs \$6,000.³⁴

Under the relevant statute, the OFR must approve an agency's request to incorporate by reference, rather than publishing in the Federal Register.³⁵ To date, however, the OFR has not publicly disclosed the extent to which it considers access charges in deciding whether a standard is "reasonably available to the class of persons affected thereby" within the meaning of the statute and thus suitable for an agency to incorporate in the Code of Federal Regulations only by "reference."³⁶ Quite obviously, many of these standards will be financially out of reach for significant numbers of individuals and small businesses.

This issue is currently receiving significant attention with an eye to reform. In December 2011, the Administrative Conference of the United States issued a tepid recommendation, acknowledging the public access problem,³⁷ but recommending only that agencies try to "promote the availability of the

available at <http://www.regulations.gov/contentStreamer?objectId=0900006481025752&disposition=attachment&contentType=pdf> (arguing that the development of "quality standards" requires resources to coordinate volunteers, to provide technical staff assistance, research, and editing, and to prepare standards for publication).

34. E.g., *AHFS Drug Information 2013*, ASHP STORE, <http://store.ashp.org/Default.aspx?TabID=216&ProductId=40143356> (last visited Sept. 29, 2013) (selling the American Hospital Formulary Service Drug Information 2013 at \$349, or at \$295 for "members"); *USP-NF*, U.S. PHARMACOPEIAL CONVENTION, http://store.usp.org/OA_HTML/usp2_ibcCtpSctDspRte.jsp?section=10071&minisite=10020 (last visited Sept. 29, 2013) (pricing U.S. Pharmacopeia National Formulary standard at \$850 each); Comment of Jacob Speidel, Staff Att'y, Senior Citizens Law Project, Vermont Legal Aid, Inc. 2 (OFR Docket June 21, 2012) [hereinafter Comment of Vermont Legal Aid], available at <http://www.regulations.gov/contentStreamer?objectId=09000064810258aa&disposition=attachment&contentType=pdf> (reporting Drugdex price of \$6,000). Another source states that Drugdex is not available for purchase by members of the general public and that the publisher would not provide details of pricing. *CMA Report: Medicare Coverage for Off-Label Drug Use*, CTR. FOR MEDICARE ADVOCACY, INC., http://www.medicareadvocacy.org/InfoByTopic/PartDandPrescDrugs/10_09.16.OffLabelDrugCoverage.htm (last visited Sept. 29, 2013).

35. 5 U.S.C. § 552(a)(1) (requiring Federal Register publication of substantive rules of general applicability, procedural rules, interpretive rules of general applicability, and other important agency documents but providing an exception for material "reasonably available to the class of persons affected thereby" and incorporated "with the approval of the Director of the Federal Register").

36. One report suggests that the OFR primarily considers whether particular regulated entities might find the cost of purchasing a standard to be "prohibitive." Emily Schleicher Bremer, *Incorporation by Reference in Federal Regulations*, ADMIN. CONF. OF THE U.S. 11 (Oct. 19, 2011), available at <http://www.acus.gov/sites/default/files/Revised-Draft-IBR-Report-10-19-11.pdf> ("Federal publication requirements tacitly acknowledge this by limiting incorporation by reference to materials that are 'reasonably available' to regulated parties.").

37. ADMIN. CONF. OF THE U.S., RECOMMENDATION 2011-5: INCORPORATION BY REFERENCE 2 (2011), available at http://www.acus.gov/sites/default/files/Recommendation-2011-5-Incorporation-by-Reference_0.pdf (noting also that increasing transparency "may conflict with copyright law" and "the significant value" of the private standards). I presently serve as a public member of the Administrative Conference.

materials while respecting the copyright owner's interest."³⁸ In early 2012, a group of law professors led by Columbia law professor Peter Strauss, and including myself, petitioned the OFR to revise its rules for incorporating by reference and to approve IBR rules only if free read-only access were provided to the public.³⁹

Shortly before this Article went to press, the OFR, after taking comment on the petition,⁴⁰ agreed to revise the rule, although the proposed rule, issued in October 2013, falls far short of what the petition requested.⁴¹ The Notice of Proposed Rule still does not address the meaning of the statutory "reasonably available" requirement, proposing instead simply to reiterate the requirement in its rules⁴² and to ask agencies to discuss their efforts to make the materials available.⁴³ Meanwhile, the proposed rule would also liberalize when agencies could incorporate outside material.⁴⁴

The issue has received scholarly attention as well. A number of commentators have stressed the value SDOs can contribute to the federal regulatory process⁴⁵ and have assessed whether SDOs possess legitimate copyright claims in the standards, once agencies incorporate them into federal rules.

38. *Id.* at 5.

39. Incorporation by Reference, 77 Fed. Reg. 11,414 (announcement of petition and request for comments, Feb. 27, 2012), *available at* <https://www.federalregister.gov/articles/2012/02/27/2012-4399/incorporation-by-reference> (reprinting petition). I also contributed substantially to the American Bar Association Administrative Law Section comments on the petition. Comment of Michael Herz, Sec. Chair, Section of Admin. Law & Regulatory Practice, Am. Bar Ass'n (OFR Docket June 1, 2012) [hereinafter Comment of ABA Admin. Law Section], *available at* <http://www.regulations.gov/contentStreamer?objectId=0900006481025ea5&disposition=attachment&contentType=pdf>.

40. *Id.* The Office of Management and Budget ("OMB") has also solicited comments on Circular No. A-119, although as of the date of writing, it has not yet announced any revisions. *See* Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 77 Fed. Reg. 19,357 (Mar. 30, 2012).

41. Incorporation by Reference, 78 Fed. Reg. 60,784, 60,797 (proposed Oct. 2, 2013).

42. *See id.* (proposing revised 1 C.F.R. § 51.7(a)(3), which reiterates statutory requirement).

43. *Id.* (proposing revised 1 C.F.R. § 51.5(a)). The proposed rule would also ask the agency to "summarize the material" proposed for incorporation, an improvement over current approaches. *Id.*

44. The OFR is proposing to expand the scope of materials that are eligible for incorporation by reference to include *any* "reasonably available" materials that would "substantially reduce[] the volume of material published in the Federal Register" or would consist of "data, criteria, standards, specifications, techniques, illustrations, or similar material." *See id.* (proposing revised 1 C.F.R. § 51.7(a)(2)). Under current rules, proposed IBR material must satisfy both these requirements as well as the "reasonabl[e] availabil[ity]" requirement. *See* 1 C.F.R. § 51.7 (2013).

45. *See, e.g.,* Lawrence A. Cunningham, *Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting*, 104 MICH. L. REV. 291, 334 (2005); Hamilton, *supra* note 19, at 1446–47; Strauss, *supra* note 2, at 499–500. Public comments filed in response to the OFR's request for comments have stressed this same point. *See, e.g.,* Comment of Rae McQuade, President, N. Am. Energy Standards Bd. 4 (OFR Docket May 31, 2012) [hereinafter Comment of N. Am. Energy Standards Bd.], *available at* <http://www.regulations.gov/contentStreamer?objectId=0900006481024904&disposition=attachment&contentType=pdf> ("[SDOs]

The possibility that the “merger” doctrine could eliminate such claims, for example, has been hotly debated.⁴⁶ And using SDO standards likely reduces demands on agency budgets, although it does so largely by shifting the cost of developing standards to those who wish to read them.

Emily Bremer argues that although incorporation by reference “impedes access to the law,” agencies should continue, in view of the value of SDO standards, to incorporate and rely on copyrighted standards, if perhaps more thoughtfully.⁴⁷ Professors Strauss and Cunningham argue for significantly greater public access, acknowledging that charging for standards interferes with the “kinds of activities American[] administrative law has long committed to fully open public notice and participation,”⁴⁸ although Strauss suggests a class of incorporated materials for which SDOs might still be permitted to charge access fees to defray revenue losses on other IBR standards.⁴⁹

Whether SDOs continue to possess a valid copyright in standards that a federal agency incorporates by reference is surely an important question that may, among other things, affect the price an agency would have to pay for public access to the standard. And SDOs unquestionably contribute services of value to the regulatory process by crafting standards that agencies wish to incorporate.

In my view, however, the discussion to date has not fully ventilated the central question of why we need law to be meaningfully accessible to the

... perform a valuable societal function that otherwise would have to be done by regulatory bodies ...”).

46. See, e.g., *Banks v. Manchester*, 128 U.S. 244, 253 (1888) (“[N]o copyright could . . . be secured in the products of the labor done by judicial officers in the discharge of their judicial duties.”); *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791, 800 (5th Cir. 2002) (en banc) (“[W]e read *Banks*, *Wheaton*, and related cases consistently to enunciate the principle that ‘the law,’ whether it has its source in judicial opinions or statutes, ordinances or regulations, is not subject to federal copyright law.”); *CCC Info. Servs. v. MacLean Hunter Mkt. Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994) (holding that private organizations retained copyright in standards referenced by state insurance law); Bremer, *supra* note 10, at 170–72; Robert Kry, Case Note, *The Copyright Law*, 111 YALE L.J. 761, 763–66 (2001); Strauss, *supra* note 2, at 560 (suggesting that although SDO copyright in *voluntary* standards is “uncontroversial[],” once they are incorporated, “the proposition that law is not subject to copyright rears its head”). The U.S. solicitor general has taken the position that the Fifth Circuit’s decision in *Veeck* was correct. Brief for the United States as Amicus Curiae, *S. Bldg. Code Cong. Int’l, Inc. v. Veeck* (2003) (No. 02-355), at 13, available at <http://www.justice.gov/osg/briefs/2002/2pet/6invit/2002-0355.pet.ami.inv.pdf> (arguing that the Fifth Circuit correctly reasoned that binding law cannot be subject to copyright limitations).

In addition, an SDO’s extensive overcharging for an IBR standard might supply a purported copyright infringer with a defense of copyright misuse. See, e.g., *Practice Mgmt. Info. Corp. v. Am. Med. Ass’n*, 121 F.3d 516, 520–21 (9th Cir. 1997) (recognizing copyright misuse defense); *Lasercomb Am., Inc., v. Reynolds*, 911 F.2d 971, 977, 979 (4th Cir. 1990) (same).

47. Bremer, *supra* note 10, at 153–54; see also Hamilton, *supra* note 19, at 1458 (arguing simply that agencies incorporating standards should provide contact information for the SDO and place copies of the referenced standard in their public reading rooms).

48. Strauss, *supra* note 2, at 542; see also Cunningham, *supra* note 45, at 334.

49. Strauss, *supra* note 2, at 549–53. See generally Hamilton, *supra* note 19, 1446–47 (discussing the value of SDOs in helping to develop standards).

public. This law is not secret. But it is far less publicly accessible than the U.S. Code, the Code of Federal Regulations, or judicial opinions. It is costly to view and often difficult to find. And these barriers may preclude many from reading it. This setting ought to prompt consideration of the reasons or principles underlying our intuition that law, in a democracy, must be easily accessible to citizens.⁵⁰

Accordingly, I put the copyright and value questions to one side and instead attempt to focus on the reasons why and the extent to which law, including regulatory law, needs to be meaningfully available to the public. Clearly, public access to binding law—even to so-called “technical” standards—is needed to provide notice to those who must comply. This concern has been incorporated into constitutional due process doctrine.⁵¹ And requiring that governmental decisions generally be public facilitates accountability for these decisions; the “threat of exposure” encourages officials to make decisions only for public-interested reasons.⁵²

But these are only initial responses regarding the reasons for and the needed extent of public access. As I discuss in detail below, access to the law needs to be widespread for several other reasons. For example, regulatory beneficiaries need notice, since they are affected by and may make choices based on the content of the standards. And law needs to be widely, publicly accessible so that the public can invoke important mechanisms of accountability, including voting, contacting Congress, participating in agency procedures, and seeking judicial review.

Ensuring the effectiveness of accountability mechanisms is more challenging in the IBR setting. IBR rules offer a significant example of so-called “collaborative governance”—the public enlisting of private institutions and resources in the process of governance. Despite other potential safeguards, broad, meaningful public access to this body of regulatory law is critical to ensuring that both the private institutions and the agencies that incorporate

50. See, e.g., Bremer, *supra* note 10, at 154 (“[I]f the material is copyrighted, reprinting it in the text of the regulation may simply not be an option.”); Hamilton, *supra* note 19, at 1418 n.304 (noting only that having to purchase a standard from an SDO is “most inconvenient for the reader”); *id.* at 1458 (“[I]n many instances those covered may already be quite familiar with the voluntary standard.”). Strauss does mention that a neighbor to a nuclear power plant may wish for “assurance of its safety,” something that it could get through SDO standards, *supra* note 2, at 502, and he comments on judicial doctrine that the standard, once incorporated, may become “public property,” *id.* at 511. Finally, he quotes language from the Montreal Declaration on Free Access to Law (2002), stating that free access to legal information “promotes justice and the rule of law.” *Id.* at 497 (quoting WORLD LEGAL INFO. INST., http://www.worldlii.org/worldlii/declaration/montreal_en.html (last visited Dec. 12, 2013)); see also Bremer, *supra* note 10, at 157 (“[T]he focus [of availability] should be broader, going beyond regulated parties to include *other interested parties*” (emphasis added)).

51. See *infra* text accompanying notes 193–195.

52. E.g., Kathleen Clark, *The Architecture of Accountability: A Case Study of the Warrantless Surveillance Program*, 2010 BYU L. REV. 357, 389–404 (national security secrecy claims interfered with accountability mechanisms). See generally Jeremy Bentham, *An Essay on Political Tactics*, in 2 THE WORKS OF JEREMY BENTHAM 299, 310 (John Bowring ed., Edinburgh, William Tait 1843), available at <http://oll.libertyfund.org/title/1921/113915> (publicity and the threat of exposure “constrain the members of the assembly to perform their duty”).

their work are properly accountable to all interested parties. Finally, agency decisions to incorporate private standards into the law, when private groups are permitted to and do charge significantly for access, represent a potentially injurious public message that is inconsistent with core democratic values.

Fully considering why law needs to be public and how public it needs to be has significant implications. First, it strengthens the case for IBR reform; ready public access, like the accessibility of the CFR, should be understood to be a condition for incorporation. This in turn limits the range of reforms, whether administrative or legislative, that should be considered acceptable. Further, a clearer understanding of why law needs to be readily available to the public could inform judicial interpretations of the Freedom of Information Act and the Administrative Procedure Act.⁵³ Individual agencies also could change their incorporation practices.

Finally, assessing public access needs in the setting of agency use of privately drafted IBR rules also sheds some light on how we should think, more generally, about the value of governmental transparency. Particularly for law or regulations—which apply broadly, impose widespread obligations, and generate benefits, and which can depend for their legitimacy on multiple mechanisms of accountability—making law formally public may not be enough. The law must be sufficiently public to serve notice and accountability functions and to express a commitment to core democratic values. Part I presents background on the use of private standards in federal rules and the access charges the public must pay to read them. Part II analyzes the legal and policy concerns that require federal rules to remain public, including notice to all those affected and the accountability of governmental actors and SDOs. Part III assesses some existing reform proposals and suggests some other options that deserve fuller investigation. The Article concludes with some observations on public access.

I. INCORPORATION BY REFERENCE OF PRIVATE STANDARDS

A. *The Use and Costs of Privately Developed Standards*

Since its enactment in 1966, FOIA has permitted the director of the Federal Register to approve an agency's "incorporation by reference" of material published elsewhere into regulatory text without reprinting it in the Federal Register.⁵⁴ The material must be "reasonably available to the class of persons affected thereby."⁵⁵ Beyond this requirement, Office of the Federal Register regulations permit incorporation by reference of a publication only if it "substantially reduces the volume of material published in the Federal

53. See 5 U.S.C. § 552(a) (2012) (Freedom of Information Act); 5 U.S.C. § 553 (2012) (Administrative Procedure Act rulemaking requirements).

54. 5 U.S.C. § 552(a)(1) (2012). This language was originally added to section 552(a) in the Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966), and codified in the U.S. Code by Pub. L. No. 90-23, 81 Stat. 54 (1967).

55. *Id.*

Register.”⁵⁶ The publication must also consist of “published data, criteria, standards, specifications, techniques, illustrations, or similar material.”⁵⁷ Congress expected this material at least to be available in libraries.⁵⁸

From time to time, Congress has specifically contemplated a federal agency’s incorporation of private standards. For example, when Congress passed the Occupational Safety and Health Act, and for two years after its effective date, Congress authorized the newly created Occupational Safety and Health Administration (“OSHA”) to adopt so-called “national consensus standards” for worker safety and even provided an exemption from the requirements of the Administrative Procedure Act (“APA”).⁵⁹

In the mid-1990s, moreover, both Congress and the White House directed agencies, where practicable, to utilize privately developed standards rather than writing new “government-unique” standards. The Office of Management and Budget (“OMB”) issued Circular No. A-119 in 1982, most recently revising it in 1998, directing agencies to rely on voluntary standards, including industry standards or consensus codes, rather than “government-unique standards.”⁶⁰ The Circular even requires an agency to provide a written explanation for issuing a government-unique standard if a consensus standard exists.⁶¹ Agencies are also implicitly free to incorporate nonconsensus private standards if they so choose.⁶² In Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (the “NTTAA”), Congress provided that, unless inconsistent with law or impractical, all federal agencies are to use “technical standards that are developed or adopted by voluntary consensus standards bodies . . . to carry out [the agencies’] policy objectives or activities.”⁶³ The NTTAA’s enactment responded to industry and SDO concerns that Circular No. A-119 would not otherwise prompt changes in agency behavior.⁶⁴

56. 1 C.F.R. § 51.7(a)(3) (2013).

57. *Id.*

58. See Strauss, *supra* note 2, at 519.

59. 29 U.S.C. § 655(a) (2006).

60. OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-119 REVISED: FEDERAL PARTICIPATION IN THE DEVELOPMENT AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES para. 1 (1998) [hereinafter CIRCULAR NO. A-119], available at http://www.whitehouse.gov/omb/circulars_a119.

61. CIRCULAR NO. A-119, *supra* note 60, para. 6.

62. *Id.* para. 6(g).

63. National Technology Transfer and Advancement Act of 1995 § 12(d), 15 U.S.C. § 272 note (2012). The Act broadly defines “[t]echnical standards” to mean “performance based or design-specific technical specifications.” *Id.* § 12(d)(4). The Act also requires agencies to transmit to OMB an “explanation of the reasons” for using government-unique standards rather than voluntary consensus standards. *Id.* § 12(d)(3).

64. See, e.g., H.R. REP. NO. 104-390, at 31 (1995) (“[The] Vice President of the American National Standards Institute (ANSI) [] stated that the Circular A-119 needs Congressional backing to be effective.”); *id.* at 25 (“Adherence to OMB Circular A-119 is a matter of great concern to industry and the Committee . . .”).

Both requirements assertedly were to reduce needless federal regulatory duplication and complexity when private industry had already devised an adequate voluntary standard. By using private standards, agencies could reduce demands on their own resources and take advantage of private sector expertise.⁶⁵

From the private side, some standards were drafted for other purposes, without anticipating agency incorporation.⁶⁶ On the other hand, some were undoubtedly written with the hope—or the plan—of incorporation into federal regulatory law.⁶⁷ Indeed, governmental agencies may even financially support private standards that are later incorporated by reference. Circular No. A-119 contemplates that agencies may provide financial support to an SDO to complete a standard, particularly when “its timely development . . . appears unlikely in the absence of such support.”⁶⁸ Finally, agency officials may also participate in SDO deliberations.⁶⁹

OFR rules do not require agencies to seek permission to incorporate outside material by reference until just before the agency issues a *final* rule.⁷⁰ APA rulemaking requirements more generally call for an agency to publish a proposed rule and provide an opportunity for public comment before finalizing the rule.⁷¹ Probably to facilitate this public comment, an agency will also typically state in a proposed rule that it plans to incorporate private material by reference. Unfortunately, the text the agency plans to incorporate is typically not included in the Federal Register. Instead, a putative public commenter may also be referred to the private organization for the text of the rule. For example, a December 2012 proposed rule issued by the Consumer Product Safety Commission (“CPSC”) for a hand-held infant carrier safety standard proposed to incorporate ASTM International (formerly the ASTM) Standard F2050-12. The proposed rule referred readers who wished to comment to <http://www.astm.org>.⁷² This standard was only available at the provided website for a price of \$49.20.⁷³

65. See CIRCULAR NO. A-119, *supra* note 60, para. 2 (listing goals, including “eliminat[ing] the cost to the Government of developing its own standards” and encouraging “harmonization of standards”); see also Bremer, *supra* note 10, at 139–41 (listing reasons for governmental agencies to rely on industry standards).

66. E.g., Strauss, *supra* note 2, at 546 (“[T]he ASME would in some sense be surprised by the conversion of all or part of one of its voluntary standards into a legal obligation. . . . [T]here could have been no bargained price, no prior contractual arrangement to develop the standard.”).

67. *Id.* at 513.

68. CIRCULAR NO. A-119, *supra* note 60, para. 7(b).

69. See Strauss, *supra* note 2, at 506 (“In Fiscal 2012, NIST reported, agency personnel participated in 552 SDOs.”).

70. 1 C.F.R. § 51.5(a)(1) (2013).

71. 5 U.S.C. § 553(b)–(c) (2012).

72. See Safety Standard for Hand-Held Infant Carriers, 77 Fed. Reg. 73,354 (proposed Dec. 10, 2012) (to be codified at 16 C.F.R. pts. 1112 & 1225).

73. ASTM F2050-12, ASTM INT’L, <http://enterprise.astm.org/filtrexx40.cgi?HISTORICAL/F2050-12.htm> (last visited Sept. 29, 2013). Despite a promise in the Federal Register that ASTM would make the standard freely available during the comment period, which ended

Neither Congress nor the original drafters of OMB Circular No. A-119 clearly anticipated that SDOs would both claim copyrights in their incorporated standards and charge access fees. The NTTAA does not mention either copyright or an access price for incorporated standards. Circular No. A-119 does indicate that agencies using voluntary consensus standards are to “observe and protect the rights of the copyright holder,” but the drafters may have anticipated agencies seeking permission to reprint private standards in the Federal Register and CFR. Indeed, the full sentence states that an agency should protect the rights of the copyright holder “[i]f a voluntary standard is used *and published* in an agency document,” suggesting that the OMB may have anticipated the agency’s reprinting of the text, rather than the SDO’s charging the public for access.⁷⁴ That would be consistent with Circular No. A-130’s comment that “[t]he free flow of information between the government and the public is essential to a democratic society.”⁷⁵ In any event, current agency practice is to incorporate standards even if SDOs charge a significant price for access.

And as noted, private SDOs do generally charge significantly. The amounts far exceed the “direct costs of search, duplication, or review” that federal agencies may charge for FOIA requests for internal agency documents.⁷⁶ By contrast, there is no charge to access statutes and federal regulations (other than IBR rules) in over 1,200 governmental depository

February 25, 2013, *see* Safety Standard for Hand-Held Infant Carriers, 77 Fed. Reg. at 73,354, I was unable to access it during repeated visits to ASTM’s “Reading Room” in January and February 2013, and I was instead only able to locate a copy for sale at the reported price. The rule was finalized shortly before this Article went to press with the CPSC’s adoption of an updated ASTM standard. Safety Standard for Hand-Held Infant Carriers, 78 Fed. Reg. 73,415 (Dec. 6, 2013) (to be codified at 16 C.F.R. pts 1112 & 1225) (incorporating by reference ASTM Standard F2050-13a, with modifications); *see also* Comment of John L. Conley, President, Nat’l Tank Truck Carriers 2 (OFR Docket May 30, 2012) [hereinafter Comment of Nat’l Tank Truck Carriers], *available at* <http://www.regulations.gov/contentStreamer?objectId=090000648102543c&disposition=attachment&contentType=pdf> (providing an example of Pipeline and Hazardous Materials Safety Administration (“PHMSA”) rulemaking as incorporating a standard that putative commenters would have to purchase, although noting that PHMSA did require the two private groups “to make portions of their copyrighted publications available electronically while the comment period was open”).

74. CIRCULAR NO. A-119, *supra* note 60, para. 6(j) (emphasis added). Paragraph 4(a) of the Circular defines “voluntary consensus standards” eligible for agency use as those including provisions requiring that owners of relevant intellectual property have agreed to make it “available on a non-discriminatory, royalty-free or reasonable royalty basis to all interested parties.” *Id.*, para. 4(a). The term “reasonable royalty” is not further defined, although the Circular clearly prioritizes availability to all interested persons, presumably including those with income constraints. The Circular does not restrict agency reliance on nonconsensus standards.

75. OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-130 REVISED: MANAGEMENT OF FEDERAL INFORMATION RESOURCES para. 7(c) (2000) [hereinafter CIRCULAR NO. A-130], *available at* http://www.whitehouse.gov/omb/circulars_a130_a130trans4.

76. 5 U.S.C. § 552(a)(4)(A)(iv) (2012). The FOIA also includes fee exemption and waiver provisions. *See id.* § 552(a)(4)(A)(iii) (discussing fees and requiring no-charge furnishing of requested documents if disclosure would likely “contribute significantly to public understanding of the operations or activities of the government”).

libraries.⁷⁷ As numerous groups and citizens have recently written, the fees that SDOs charge can be prohibitive, particularly for ordinary citizens and small businesses subject to the standards. For example, an architect wrote to the OFR noting that his work often required compliance with the Americans with Disabilities Act and its implementing regulations, which include some incorporated standards; the occasional access needed to incorporated standards was so expensive that the standards could not be considered “reasonably available” to him.⁷⁸ Similarly, a homeowner pointed out in public comments that homeowners are normally permitted to perform repairs and renovations to their own homes without hiring professionals but that for him to understand the applicable sprinkler system rules, he would have had to purchase that single standard privately at an “excessive” cost of \$82.⁷⁹

For many years, tank truck operators, as they wrote to the OFR, had to pay the Compressed Gas Association a significant fee to find out the definition of a “dent.”⁸⁰ Trucking is an industry with a high percentage of small businesses, and as another trade association stated in its letter to the OFR, “Purchasing technical reference materials can be cost-prohibitive for small businesses, medium-sized businesses, and individuals.”⁸¹ Finally, the New York City Department of Environmental Protection, responsible for delivering high-quality drinking water and wastewater services, similarly noted that “[t]he high costs of many of the standards and the extensive licensing requirements preclude easy access.”⁸²

77. See *Federal Depository Library Program*, U.S. GOV'T PRINTING OFFICE, <http://www.gpo.gov/libraries/> (last visited Nov. 12, 2013) (listing libraries and stating, “Anyone can visit a Federal depository library and will have access to all collections for free”).

78. Comment of James Pettit, Jr., Senior Assoc., Penza Bailey Architects, Inc. 1 (OFR Docket Apr. 4, 2012) [hereinafter Comment of Penza Bailey Architects], *available at* <http://www.regulations.gov/contentStreamer?objectId=0900006480fe7d25&disposition=attachment&contentType=pdf>; see also Comment of Glen Self 1 (OFR Docket Mar. 20, 2012), *available at* <http://www.regulations.gov/contentStreamer?objectId=0900006480fbed1&disposition=attachment&contentType=pdf> (“During my working career over the past 45 years I have worked in many areas where the product was governed by regulations that contained [IBR material]. . . The worst effect is when work is done improperly because the worker can’t afford to purchase the standard . . . [T]he cost of various standards is prohibitively expensive to small business.”).

79. Comment of Robert Tess 1 (OFR Docket Mar. 23, 2012), *available at* <http://www.regulations.gov/contentStreamer?objectId=0900006480fddd35&disposition=attachment&contentType=pdf>; see also Comment of Owen Crabtree, Mech. Eng’r, InSynergy Eng’g, Inc. to Office of the Fed. Register, Nat’l Archives & Records Admin. 1 (OFR Docket Mar. 20, 2012), *available at* <http://www.regulations.gov/contentStreamer?objectId=0900006480fdbevca&disposition=attachment&contentType=pdf> (“[H]aving this invisible paywall discourages individuals and entrepreneurs from innovating.”).

80. Comment of Nat’l Tank Truck Carriers, *supra* note 73, at 3.

81. Comment of Dave Oslecki, Senior Vice President, Policy & Regulatory Affairs, Am. Trucking Ass’n 1, 2 (OFR Docket June 1, 2012), *available at* <http://www.regulations.gov/contentStreamer?objectId=0900006481025c7e&disposition=attachment&contentType=pdf>.

82. Comment of Melinda Sherer, Ass’t Counsel, NYC Env’tl. Prot. 1 (OFR Docket May 25, 2012), *available at* <http://www.regulations.gov/contentStreamer?objectId=090000648101cf2d&disposition=attachment&contentType=pdf>.

It should be noted that a couple of SDOs have recently decided to provide free read-only access on their websites for some IBR standards. This is certainly a positive development, although the “reading rooms” are not easy to locate and the home pages of the websites do not advertise their existence.⁸³ Even these SDOs, however, continue to claim a copyright and the entitlement to revoke free access at any time.⁸⁴ A reader must also waive any challenges to the copyright as a condition of getting to see the document.⁸⁵ Needless to say, the revenue-maximizing choice for SDOs—particularly for a standard that is not simply voluntary but is incorporated into binding federal law—may well not be to charge the cheapest price.⁸⁶ No law or agency action appears generally aimed at restricting the prices SDOs charge for IBR standards.⁸⁷

B. SDO Procedures

Private organizations that issue standards have widely variable processes, and federal law requires no particular procedures for the development of the outside material that an agency incorporates by reference.⁸⁸ By contrast, the “notice and comment” process for federal agency rulemaking is now well established. Under the APA, the agency publishes a proposed rule with a “concise general statement of [its] basis and purpose,” discloses the data underlying the rule to facilitate public comment, and waits for a stated period of time to receive public comments.⁸⁹ The final rule includes a response

83. See, e.g., AM. PETROLEUM INST., <http://www.api.org> (last visited Sept. 29, 2013); ASTM INT’L, <http://www.astm.org> (last visited Sept. 29, 2013). On the API website, a reader must click on “Government-Cited and Safety Documents” and then click on another link bearing the same name to reach a website requiring user registration. *Government-Cited and Safety Documents*, AM. PETROLEUM INST., <http://publications.api.org> (last visited Sept. 29, 2013). To navigate to the ASTM reading room, one must click on “Standards & Publications” on the right sidebar and then select “Reading Room” on the left sidebar of that page. *Reading Room*, *supra* note 33.

84. To access the ASTM Reading Room, a reader must agree to the terms of ASTM’s License Agreement, which stipulate that all standards are copyrighted by ASTM. *ASTM License Agreement*, *supra* note 30. To access API documents, the reader must accept a license “acknowledg[ing] that the content . . . is copyrighted and owned by API” and that “API may suspend or discontinue providing the Online Document to you with or without cause and without notice.” *Government-Cited and Safety Documents*, *supra* note 30.

85. See *ASTM License Agreement*, *supra* note 30; *Government-Cited and Safety Documents*, *supra* note 30.

86. See *infra* text accompanying notes 361–363. Reduced elasticity in market demand means that buyers will not reduce the quantity they purchase very much even in the face of a price increase by sellers. As the only supplier of a particular IBR standard with which compliance is federally required, an SDO will thus have substantial power to set prices.

87. The one specific exception seems to be recent pipeline safety legislation. See *infra* note 145 and accompanying text.

88. 5 U.S.C. § 552(a) (2012).

89. *Id.* § 553(c); see also *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 251–52 (2d Cir. 1977) (proposed rule document must include any scientific information on which agency relied); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393–94 (D.C. Cir. 1973)

to comments, and the agency must republish the rule for additional comment if an intended revision is more than a "logical outgrowth" of the original rule.⁹⁰

With respect to private material, federal law does not restrict incorporation by reference based on the process used by the private organization. For example, although it prefers agencies to use standards coming from such groups over "government-unique" standards, the NTTAA contains no definition of or criteria for a "voluntary consensus standards body."⁹¹

Circular No. A-119 does provide general criteria: a voluntary consensus standard is one that comes from a "voluntary consensus standards bod[y]," which generally has the attributes of "[o]penness," "[b]alance of interest," "[d]ue process," and an "appeals process," together with the goal of "[c]onsensus," which means that the procedure must be designed to yield "general agreement, but not necessarily unanimity," including a "process for attempting to resolve objections by interested parties."⁹² These "voluntary consensus body" attributes are surely commendable criteria for any deliberative process, including a process run by agency administrators or elected officials.⁹³ But they are not actually required. Neither statute nor OMB policy appears to constrain an agency from incorporating a "nonconsensus standard"⁹⁴ or even includes a preference for a private consensus standard

(noting that agencies must respond to comments that "step over a threshold requirement of materiality").

90. See, e.g., *Am. Med. Ass'n v. United States*, 887 F.2d 760, 768 (7th Cir. 1989) ("[T]he relevant inquiry is whether or not potential commentators would have known that an issue in which they were interested was 'on the table' . . .").

91. See NATIONAL TECHNOLOGY TRANSFER AND ADVANCEMENT ACT OF 1995 § 12(d), 15 U.S.C. § 272 note (2012) (Utilization of Consensus Technical Standards by Federal Agencies).

92. CIRCULAR NO. A-119, *supra* note 60, para. 4. In its approach to using industry consensus standards from national organizations for underground storage tanks, the Environmental Protection Agency ("EPA") also has explained that it means a "nationally recognized organization" to encompass a "technical or professional organization that has issued standards formed by the consensus of its members." Underground Storage Tanks; Technical Requirements, 53 Fed. Reg. 37,082, 37,185–86 (Sept. 23, 1988). The EPA listed several such organizations that had issued codes and standards referenced in the agency's rules, ranging from the API to the Underwriters Laboratory. *Id.* at 37,185 ("[O]rganization[s] should ensure consideration of all relevant viewpoints and interests, including those of consumers . . ."); see also ADMIN. CONF. OF THE U.S., RECOMMENDATION 78-4, FEDERAL AGENCY INTERACTION WITH PRIVATE STANDARD-SETTING ORGANIZATIONS IN HEALTH AND SAFETY 3 (1978), available at <http://www.acus.gov/sites/default/files/documents/78-4.pdf> ("An agency having authority to issue mandatory health or safety regulations should draw on the knowledge and information available in active technical committees that develop relevant voluntary consensus standards . . .").

93. E.g., Hamilton, *supra* note 19, at 1347–68 (overviewing ANSI's procedures as of 1978).

94. CIRCULAR NO. A-119, *supra* note 60, para. 6(g) ("This policy does not establish a preference among [consensus and nonconsensus private] standards Specifically, agencies that promulgate regulations referencing non-consensus standards . . . are not required to report on these actions . . ."). But cf. ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM

over a nonconsensus standard. Research has uncovered no agency rules further restricting agency choice among privately developed standards. An agency seems free to incorporate standards from an SDO with any sort of process.

Second, as a practical matter, and notwithstanding Circular No. A-119's criteria, SDO processes vary widely. At the API, whose standards are incorporated close to 280 times in the CFR,⁹⁵ standards development is undertaken primarily by committee. While outsiders apparently may participate—and the API states that governmental officials and academics do participate on committees—the organization requires a company name for application to participate, warns that travel is required, and states that it is advisable to have “your management’s support in order to facilitate effective participation.”⁹⁶ Meanwhile, the API’s members come entirely from the petroleum industry,⁹⁷ and the API is generally regarded as a representative of that industry.⁹⁸

At ASTM International, the SDO that has supplied the most incorporated standards to the federal government (close to 900 standards, incorporated over 2,000 times in the CFR⁹⁹), only members may participate in standards development; the lowest level of membership costs \$75 per year.¹⁰⁰ As one commenter pointed out to the OFR last year concerning ASTM toy standards incorporated into federal rules, “[S]ince this standard [must be purchased to be read] and is written by a [] [nongovernmental organization] that primarily intersects with industry and related groups, consumers have little opportunity to participate in rewriting the standard or expressing their feedback directly to ASTM.”¹⁰¹

OF MONOPOLY 31–32 (1966) (noting that the National Industrial Recovery Act required the president to find that industrial codes were “truly representative” prior to approving them).

95. See Bremer, *supra* note 10, at 150. Bremer notes that sixty-three unique standards created by the API have been incorporated. *Id.*

96. See *Standards Committee Application*, AM. PETROLEUM INST., <http://www.api.org/publications-standards-and-statistics/standards-committee-application.aspx> (last visited Sept. 29, 2013).

97. See *API Member Companies*, AM. PETROLEUM INST., <http://www.api.org/global-items/globalheaderpages/membership/api-member-companies.aspx> (last visited Sept. 29, 2013).

98. See, e.g., John M. Broder, *Hands off, Oil Industry Warns Government*, N.Y. TIMES GREEN BLOG (Jan. 8, 2013, 2:59 PM), <http://green.blogs.nytimes.com/2013/01/08/hands-off-oil-industry-warns-government/?ref=amer> (reporting on statement of head of the API).

99. See Bremer, *supra* note 10, at 150 (885 unique ASTM standards have been incorporated 2,230 times in the CFR).

100. See *Technical Committees*, ASTM INT’L, <http://www.astm.org/COMMIT/newcommit.html> (last visited Sept. 29, 2013) (“Any interested individual can participate on a Technical Committee [that develops and maintains ASTM standards] through ASTM membership.”). The least expensive membership is \$75 per year, which entitles members to “participate in the development of high quality, market relevant standards” and to get a discount on ASTM publications. See *Benefits for ASTM Participating Members*, ASTM INT’L, <http://www.astm.org/MEMBERSHIP/participatingmem.htm> (last visited Sept. 29, 2013).

101. Comment of Samantha Gordon 1 (OFR Docket Mar. 30, 2012), available at <http://www.regulations.gov/contentStreamer?objectId=0900006480fe4d7a&disposition=attachment&>

The North American Energy Standards Board (“NAESB”) develops standards that the Federal Energy Regulatory Commission incorporates by reference to define all manner of public utility and natural gas pipeline regulation. Although it permits some state public utility commissions and the Department of Energy to join,¹⁰² NAESB describes itself as a trade organization and an “industry forum for the development and promotion of standards”¹⁰³ Membership costs \$6,500. Rules under development are subject to very limited viewing by nonmembers. Although the organization accepts written comments on draft proposals, NAESB has historically relied on an in-person committee process for participation and drafting.¹⁰⁴ Participation in that process now requires payment: “Non-members face charges for meeting participation by telephone or in person (\$100 for a meeting of four hours or less; \$300 for a longer one), or for a year’s participation in the work of a given subcommittee (\$1000).”¹⁰⁵

The National Rural Electric Cooperative Association (“NRECA”), an association of over 900 nonprofit rural electric utilities that provide power to 42 million consumers, has commented on the difficulty of participating in NAESB proceedings. Although the NRECA itself is a member of the NAESB, a substantial number of its own members are not NAESB members. NRECA thus cannot “share the [draft] standards with its membership,” although those members must comply with the standards once finalized.¹⁰⁶ This impedes the group’s ability to participate in standards development on behalf of its members.¹⁰⁷

The American Society of Health Systems Pharmacists Drug Information compendium, which lists acceptable off-label uses of pharmaceuticals and thus constrains Medicare coverage, does not appear to incorporate public input at all but instead is developed solely by a “professional staff of drug information analysts and editors with strong scientific and therapeutic backgrounds” subject to an unspecified “external review process.”¹⁰⁸

contentType=pdf. This problem parallels difficulties in international standards organizations. See TIM BÜTHE AND WALTER MATTLI, *THE NEW GLOBAL RULERS* 224 (2011) (“[C]onsumer representatives are frequently viewed as ‘outsiders’ in private-sector rule-making bodies.”).

102. Strauss, *supra* note 2, at 539 n.271.

103. See *About NAESB*, N. AM. ENERGY STANDARDS BD., <http://www.naesb.org/aboutus.asp> (last visited Sept. 29, 2013). For its comments, see Comment of N. Am. Energy Standards Bd., *supra* note 45.

104. See Strauss, *supra* note 2, at 539–41.

105. *Id.* at 541.

106. Comment of Richard Meyer, Senior Regulatory Counsel, Nat’l Rural Elec. Coop. Ass’n, and Adrienne E. Clair, Stinson Morrison Hecker LLP 3 (OFR Docket Mar. 28, 2012), available at <http://www.regulations.gov/contentStreamer?objectId=0900006480fe3ed2&disposition=attachment&contentType=pdf>.

107. See *id.* at 5–6.

108. See *Off-Label Uses: Overview*, AHFS DRUG INFO., http://www.ahfsdruginformation.com/off_label/overview.aspx (last visited Sept. 29, 2013).

The American National Standards Institute (“ANSI”), a nonprofit that has supplied the federal government with close to 200 standards incorporated by reference into more than 550 rules¹⁰⁹ and that has the most extensive and most appealing procedural requirements for a proposed “American National Standard,” depends on numerous “standards developer” groups to supply standards. ANSI provides complex accreditation and procedural requirements for these groups in a twenty-seven-page document.¹¹⁰ These groups must be accredited by ANSI, follow its processes in developing standards, and then publish suggested new standards through a weekly ANSI publication, *ANSI Standards Action*, for comment and public review.¹¹¹ ANSI provides for public comment on its draft standards, as do ANSI-accredited groups such as the ASME.¹¹² A representative of ASME has further stated that the group attempts to solicit participation from “every kind of stakeholder,”¹¹³ surely a valuable goal. Once the group resolves objections to proposed standards, it submits the proposed standards, together with the resolution of objections, to the ANSI Board of Standards Review.¹¹⁴ A standard will be eligible for designation as an “American National Standard” if the developer has attempted to resolve conflicts, shows consensus, and states that it has complied with its applicable procedures, among other criteria.¹¹⁵ Internal appeals are even available.¹¹⁶

Even with these demanding procedural requirements, ANSI’s processes are far from fully “open.” Prior to publication in the newsletter, public information on which standards are under development is hard to acquire,

109. See Bremer, *supra* note 10, at 150 (179 ANSI standards incorporated into 554 federal rules).

110. See generally AM. NAT’L STANDARDS INST., ANSI ESSENTIAL REQUIREMENTS: DUE PROCESS REQUIREMENTS FOR AMERICAN NATIONAL STANDARDS (2013), available at http://publicaa.ansi.org/sites/apdl/Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/2013_ANSI_Essential_Requirements.pdf.

111. See, e.g., ANSI STANDARDS ACTION, Feb. 22, 2013, available at http://publicaa.ansi.org/sites/apdl/Documents/Standards%20Action/2013_PDFs/SAV4408.pdf.

112. E.g., Notice of Public Workshop to Discuss Implementing Incorporation by Reference Requirements of Section 24 of the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, U.S. DEP’T OF TRANSP. (July 13, 2012, 8:00 AM), <http://mediasite.yorkcast.com/webcast/Viewer/?peid=e8c2cc8919ef41a7821e7f6c85b35f111d>; see also Joseph Wendler, Dir. of Standards and Certification Initiatives, Am. Soc’y of Mech. Eng’rs, Statement of ASME Representative (July 13, 2012), available at <https://law.resource.org/pub/us/cfr/regulations.gov.docket.03/phmsa.workshop/workshop.01.08.html> (transcribing statement given beginning at slide 55 of U.S. DEP’T OF TRANSP., *supra*).

113. Wendler, *supra* note 112.

114. AM. NAT’L STANDARDS INST., ANSI ESSENTIAL REQUIREMENTS, *supra* note 110, at 15–16.

115. *Id.*

116. *Id.* at 9–10.

and draft standards must often be purchased to exercise any right to comment.¹¹⁷ According to one official at ANSI, even if proposed standards modifications are freely available to the public, the underlying standards will only be made available through purchase.¹¹⁸ Just as with a modification to a federal-agency-drafted rule, making sense of proposed modifications without the context of the underlying standard can obviously be difficult. For example, draft revisions to an ANSI standard on medical and psychological requirements for nuclear power plant reactor operators were posted for comment during the writing of this Article. My searching revealed that the original standard, however, was available only on payment of \$30.¹¹⁹ Similarly, a proposed ANSI standard originally developed by the American Ladder Institute on safety requirements for ladder accessories was only available on payment of \$50.¹²⁰

Moreover, it remains unclear whether participation in these standards development procedures is even roughly representative of the range of public views, despite ANSI's commitment to an "open" process. For example, among ANSI's accredited standards developers are the API, whose membership and processes have already been described, and the American Iron and Steel Institute ("AISI"),¹²¹ which describes itself as the "voice of the North American steel industry."¹²²

ANSI's requirements surely appear laudable, but they are unlikely to ensure a representative participation process or even one that is truly open to the public. This is because a member of the public will face significant obstacles to meaningful participation. An interested citizen may have a difficult time discovering that a standard is under development and will then have to pay to read it in order to comment. Moreover, when Congress passed the NTTAA, small business witnesses testified that significant costs—including traveling to SDO meetings—impeded their participation in SDO

117. See *Call for Comment on Proposals Listed*, ANSI STANDARDS ACTION, Feb. 22, 2013, at 1, available at http://publicaa.ansi.org/sites/apdl/Documents/Standards%20Action/2013_PDFs/SAV4408.pdf (providing suggested changes to multiple standards but omitting full standards); Wendler, *supra* note 112 (noting that only "revisions" are published in advance of comment period).

118. Telephone Interview with Patricia Schroeder, Am. Nat'l Standards Inst. (Jan. 29, 2013) (notes on file with author).

119. *Call for Comment on Proposals Listed*, *supra* note 117, at 3.

120. *Id.*

121. See generally *ANSI-Accredited Standards Developers Contact Information*, ANSI STANDARDS ACTION, Feb. 22, 2013, at 22, available at http://publicaa.ansi.org/sites/apdl/Documents/Standards%20Action/2013_PDFs/SAV4408.pdf.

122. *About AISI*, AM. IRON & STEEL INST., <http://www.steel.org/en/About%20AISI.aspx> (describing its twenty-six "integrated and electric furnace steelmaker" members and 125 associate or affiliate members who are "suppliers to or customers of the steel industry") (last visited Sept. 29, 2013).

standards development.¹²³ Challenges to participation in SDO standards development are likely to be at least as significant for consumers, Medicare recipients, and other interested individuals.¹²⁴

By contrast, while participation in federal rulemaking might too be criticized as less than perfectly representative,¹²⁵ filing comments in any pending federal rulemaking by using <http://www.regulations.gov> is comparatively straightforward. Apart from the necessity of online access, which can be obtained at a local public library, the relevant documents can be accessed without charge, and anyone can freely comment.

At best, then, full public access to SDO decisionmaking is limited, and even when such an organization's process is formally open to participation, it is often difficult to tell who participates in decisions. At worst, groups may be unrepresentative and decisionmaking closed. SDOs have been criticized as being dominated by regulated entities and, in particular, by the largest of those entities.¹²⁶ For example, the Pipeline Research Council International, which has supplied a few IBR standards to the Department of Transportation, is "a community of the world's leading pipeline companies."¹²⁷ As noted, the API and the AISI both identify themselves as voices for their respective industry communities.¹²⁸

SDOs may also vary in their approaches to information gathering and analysis, as well as in their goals. At their most basic, SDO standards may simply not be targeted to achieving the goals of federal statutes that agencies must implement. In one study of privately developed standards incorporated by OSHA, Professors Shapiro and McGarity found that the standards often provided "limited protection for workers" because "industry-dominated committees are more reluctant than OSHA to characterize a substance as a carcinogen, and less likely to rely on published scientific data instead of industry-supplied information."¹²⁹ Similarly, Shapiro discusses the difficulties

123. Small business representatives testified to this effect in the mid-1990s when Congress enacted the NTTAA. Wolf, *supra* note 18, at 821 ("[M]embers of the business community testified that the standards development process discriminated against small business[es, which] often lack the time, money, and workforce necessary to send representatives across the country to participate in various SDO meetings.").

124. See, e.g., Comment of Rachel Weintraub, Dir. of Prod. Safety and Senior Counsel, Consumer Fed'n of Am. 1 (OFR Docket June 1, 2012) [hereinafter Comment of Consumer Fed'n of Am.], available at <http://www.regulations.gov/contentStreamer?objectId=0900006481023352&disposition=attachment&contentType=pdf> ("Without unfettered access to these standards . . . important constituencies such as individual consumers and public interest and consumer organizations will be unable to participate in these proceedings.").

125. See, e.g., sources cited *infra* notes 338–339.

126. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 534, 641–42 (2000); Hamilton, *supra* note 19, at 1372–73; Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389, 407–08 (2003).

127. *About PRCI*, PIPELINE RESEARCH COUNCIL INT'L, <http://prci.org/index.php/about/> (last visited Sept. 29, 2013).

128. See *supra* text accompanying notes 98, 122.

129. Shapiro, *supra* note 126, at 408 (citing THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, *WORKERS AT RISK* 283 (1993)).

with federal reliance on accounting standards developed by the industry itself.¹³⁰ Moreover, some have alleged that “consensus” product safety standards are very often inadequate to “reduce or eliminate an unreasonable risk” from the product,¹³¹ which is the Consumer Product Safety Act’s requirement for such safety standards.¹³²

Further, although federal agencies generally conduct their own notice and comment proceedings when incorporating a private standard, and this federal rulemaking process is open to the public at <http://www.regulations.gov>, the process’s usefulness in filling potential gaps in SDO processes is likely to be limited. The text proposed for incorporation must often be obtained from an SDO, rather than directly from the Federal Register.¹³³ Further, unlike federal agencies, private SDOs appear to be under no particular or consistent obligation to disclose the data underlying their standards to the public.¹³⁴ For example, the APA and the FOIA apply only to agencies.¹³⁵ While I have not conducted a systematic study, at least some such research supporting these standards also appears to be copyrighted and only available for a fee. For example, a proposed regulation by the CPSC authorizing the use of an ASTM method for measuring lead concentrations for paint layers to determine compliance with federal standards stated that the supporting data could be obtained by requesting an identified research report from ASTM.¹³⁶ This report is only available from ASTM for a price of \$54.¹³⁷ Other research reports available online are similarly

130. *Id.* at 406–11. The Sarbanes–Oxley Act ultimately displaced these standards. *Id.* at 409.

131. See Comment of Consumer Fed’n of Am., *supra* note 124, at 2.

132. See 15 U.S.C. § 2056(a) (2012) (“A consumer product safety standard . . . shall be reasonably necessary to prevent or reduce unreasonable risk of injury associated with such product.”).

133. See *supra* text accompanying notes 70–73.

134. *E.g.*, *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 251–52 (2d Cir. 1977); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393–94 (D.C. Cir. 1973). As yet, the courts do not appear to have addressed the question whether the APA might require this sort of disclosure when a federal agency proposes to incorporate an SDO standard by reference.

135. Administrative Procedure Act, 5 U.S.C. § 551(1) (2012) (defining “agency” as “each authority of the Government of the United States”); Freedom of Information Act, *id.* § 552 (requiring “agenc[ies]” to comply with disclosure requirements); *Int’l Brominated Solvents Ass’n v. Am. Conference of Gov’t and Indus. Hygienists, Inc.*, 393 F. Supp. 2d 1362, 1379–80 (M.D. Ga. 2005) (refusing to find that ACGIH was an “agency” for purposes of the APA despite ACGIH’s issuance of de facto “exposure levels” adopted by OSHA); see also *id.* at 1383–84 (refusing to hold that ACGIH was subject to the Federal Advisory Committee Act).

136. Third Party Testing for Certain Children’s Products; Notice of Requirements for Accreditation of Third Party Conformity Assessment Bodies—Lead Paint, 76 Fed. Reg. 18,645, 18,646 (Mar. 30, 2011) (to be codified at 16 C.F.R. pt. 1303) (finding that only test methods specified by CPSC rule and by ASTM F2853-10 are considered effective for testing paint and surface coatings; stating that “[s]upporting data . . . ha[ve] been filed with ASTM and can be obtained by contacting ASTM”).

137. Telephone Interview with ASTM Customer Serv. (Feb. 26, 2013) (notes on file with author).

priced.¹³⁸ The price for accessing supporting data, as well as regulatory text, impedes individuals and entities from filing meaningful comments through the federal notice-and-comment rulemaking process.

Finally, even after standards are incorporated, SDOs do not seem bound to continue making incorporated standards available at *any* price, even when they are referenced in and compose a portion of federally binding law. As Strauss discusses, OSHA rules for construction incorporate ANSI requirements in mandatory signage rules, requirements that cannot now be accessed and are not even listed as among ANSI's publications.¹³⁹ Similarly, OSHA's mandatory safety standards for cranes incorporate an ANSI requirement that is no longer available from ANSI at all.¹⁴⁰ These standards may still be viewed in the OFR reading room in Washington, D.C., but this is clearly insufficient access for a regulated entity or an interested person in, say, Oklahoma. While the rule is not "secret," that the text is available only in the Washington, D.C., reading room might well supply a regulated entity with a due process defense to enforcement of the rule.¹⁴¹ In these settings, the SDO, rather than the agency, has effectively repealed the federal standard by sharply curtailing access—contrary to the requirements of the APA.¹⁴²

In short, IBR standards are developed in processes that are not consistently open to the public, cannot easily be found in the Federal Register or the CFR, and are primarily available—whether the standards are under development or finalized—for a significant payment set by the private entity supplying them or by paying the cost of traveling to Washington, D.C. Even studies supporting the standards may be subject to access charges, further impeding the usefulness of the federal notice-and-comment process as a means of obtaining public input on the incorporated standards. Finally, without explanation or agency process, SDOs have made some incorporated standards entirely unavailable, likely undermining or even eliminating their enforceability.

138. See *Research Reports by Committee*, ASTM INT'L, <http://www.astm.org/Standard/researchreports.html> (last visited Sept. 29, 2013).

139. Strauss, *supra* note 2, at 549–51.

140. See 29 C.F.R. § 1910.179(b)(2) (2012) ("All new overhead and gantry cranes . . . shall meet the design specifications of . . . ANSI B30.2.0-1967, which is incorporated by reference . . ."). This standard is neither catalogued nor available on the ANSI website. See AM. NAT'L STANDARDS INST., <http://www.ansi.org> (last visited Sept. 29, 2013). The ASME standard cited in the Introduction for determining the strength of corroded pipelines, see *supra* text accompanying note 15, also appears to be unavailable from ASME. See AM. NAT'L STANDARDS INST., *supra*.

141. See *infra* note 191 (citing cases discussing due process's "fair warning" requirement).

142. See 5 U.S.C. § 551(5) (2012) ("['R]ule making' means agency process for formulating, amending, or repealing a rule."). It could be, of course, that these federal standards are so old that they need to be revised, but having this decision effectively under unilateral private control raises troubling legal issues and shows the potential extent of private control over access to public standards.

II. DOES LAW NEED TO BE PUBLIC?

The IBR situation runs afoul of a widely shared intuition—that law created by the federal government needs to be public. The rules are not secret, but unlike other binding federal law, they are expensive to access and difficult to find. The lack of access raises important issues about transparency. To be sure, public access issues around IBR rules have been less of a focal point compared with public access to a range of less broadly applicable, but more captivating, governmental decisions: say, whether and whom to wiretap or whether drone strikes can be used abroad (or domestically) to target American citizens who are suspected terrorists. Meanwhile, proponents of IBR have suggested that, despite the lack of access, it saves agencies significant resources to use these rules, and (perhaps unlike wiretapping decisions) some citizens may not see them as terribly interesting or important because they are “technical.”¹⁴³

In the IBR setting, we have spent comparatively little time assessing why duly promulgated federal rules might need to be readily accessible to the public. Examining the extent of public access to IBR rules can supply some further insights into the arguments about why law needs to be accessible to the public. And the issue may matter immediately for several reasons.

First, it could matter for purposes of legal reform by Congress, the executive branch, or the judiciary. Congress could, as it has with the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011,¹⁴⁴ simply state that all materials incorporated into federal rules must be available to the public for free, or it could expressly address the copyright and public access issues in another way.¹⁴⁵

Similarly, fully assessing why law needs to be public could affect executive reform decisions. As noted, the OFR is proposing to revise its IBR rules.¹⁴⁶ And the OMB has indicated that it may consider revising Circular No. A-119.¹⁴⁷ Meanwhile, individual agencies could change their incorporation practices.

Further, IBR rules could face legal challenges under the APA and the FOIA. For example, one could argue that agency utilization of material for

143. See, e.g., Bremer, *supra* note 10, at 183 (“[I]t bears noting that most standards incorporated by reference . . . are highly technical. Even if . . . freely available, it may not be meaningfully accessible to members of the public . . .”).

144. Pub. L. No. 112-90, § 24, 125 Stat. 1904, 1919 (2012) (to be codified at 49 U.S.C. § 60102(p)) (barring incorporation by reference in either guidance or regulations unless relevant documents are “made available to the public, free of charge, on an Internet Web site”), amended by Pub. L. No. 113-30 § 1, 127 Stat. 510 (2013) (delaying effective date and deleting requirements for guidance documents and internet availability but retaining free availability requirements).

145. See Wendler, *supra* note 112 (“We submitted letters to both the Senate and House of Representatives requesting a repeal of [the Pipeline Safety Act] provision.”).

146. See *supra* text accompanying notes 40–44.

147. Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 77 Fed. Reg. 19,357 (Mar. 30, 2012).

which SDOs charge access fees violates the FOIA's statutory requirement that incorporated materials be reasonably available to the "class of persons affected."¹⁴⁸ The term "affected" could be broadly construed to include more than just those tasked with compliance.¹⁴⁹ And any reasonable sense of the words "persons affected" would seem to encompass, depending on the subject area, large groups of consumers, employees in hazardous workplaces, Medicare beneficiaries, and neighbors of natural gas pipelines.¹⁵⁰ For such "affected" persons, the access fees charged may present a barrier that is far from "reasonable." The thousands of IBR standards are wide ranging in subject and quasi-legislative in character. Yet, the only access is typically through travel to the Washington, D.C., OFR reading room or what SDOs elect to provide.

A court might also hear arguments that a federal rule with incorporated private material for which access fees are charged violates the APA. The APA requires that an "interested person[]" be able to comment on a proposed rule.¹⁵¹ Commenting is difficult, at best, when the text of the proposed rule is subject to a significant access fee. The APA also requires agencies to afford any "interested person" the right to petition to revise, repeal, or issue a rule.¹⁵² That SDOs are permitted to charge significant access fees similarly impedes the statutory right to petition. Finally, SDO decisions to cease publishing standards that are incorporated by reference into federal rules would seem to amount to de facto regulatory repeal, in violation of the APA's requirements that notice-and-comment procedures accompany repeal or amendment of a federal rule.¹⁵³ Again, a more thorough understanding of the reasons for public access to the law might affect the way a court interprets and applies the APA.

A fuller understanding of the importance of ready public access to law might also be relevant to a judicial assessment of whether Congress granted the OFR the authority to interpret the APA in a way that raises arguable constitutional issues—namely, by interfering with fair notice for individuals

148. 5 U.S.C. § 552(a)(1). These arguments are developed in more detail in the public comments of the American Bar Association Section on Administrative Law and Regulatory Policy filed in response to the petition to the OFR to revise IBR rules. *See* Comment of ABA Admin. Law Section, *supra* note 39. I contributed substantially to this document.

149. For example, 5 U.S.C. § 552(a)(1) provides special protection for those "required to resort to" government rules and policies, clearly a narrower class than those "affected."

150. Moreover, 5 U.S.C. § 702 uses the narrower term "adversely affected" to help define who can seek judicial review of agency action. This is nonetheless understood to cover a wide range of those with concrete interests in agency action, beyond those who are directly regulated. *E.g.*, *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 870 (2011) (holding that one who is "adversely affected" may challenge agency action if the interest is arguably "within the zone of interests" of the statute).

151. *See* 5 U.S.C. § 553(c); *cf.* *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 251–52 (2d Cir. 1977) (requiring agencies to disclose data to effectuate a meaningful right to public comment).

152. 5 U.S.C. § 553(e).

153. *See id.* § 551(5) (defining "rule making" as "agency process for formulating, amending, or repealing a rule").

or small businesses lacking the resources to access standards,¹⁵⁴ by impeding public criticism of governmental actions,¹⁵⁵ or by adopting a system that differentiates between citizens based on wealth.¹⁵⁶ And finally, a more thorough assessment of the importance of ensuring meaningful access to federal rules could affect our approach, more generally, to governmental transparency.

I accordingly turn to a brief history of public access to U.S. laws, followed by an assessment of the values served by public access to these laws.

A. *The Establishment of Public Access to Statutes and Regulations*

Since at least 1795, the U.S. tradition has been to provide inexpensive and widespread public access to the law. Prior to 1795, at least three newspapers in each state were responsible for printing authentic copies of laws and regulations.¹⁵⁷ Access to laws through the newspapers was not free, although subscription charges were reportedly low.¹⁵⁸ Moreover, through the 1792 Post Office Act, Congress provided for newspapers to be carried in the mail at rates far lower than for letters, specifically for “the diffusion of knowledge,” including public information.¹⁵⁹

Although publication in newspapers might be understood to effectuate a fairly wide distribution of the contents of the law—and federal utilization of private publishers was probably less expensive than governmental publication—by 1795, Congress decided to stop relying on newspapers to apprise the public of the law’s contents. Instead, Congress took on the distribution of the laws as a public function, including providing the public with free access through libraries.¹⁶⁰ Of course, Congress did not, and still does not, require distribution of a free set of laws to each citizen. But beginning in

154. See *infra* notes 191–193 and accompanying text (on fair notice requirements).

155. See *infra* notes 344, 346–347 and accompanying text (on freedom of speech and equal protection issues).

156. See *infra* text accompanying note 347.

157. In 1789, the secretary of state was to send authenticated copies of slip laws to senators, representatives, and governors, and to select at least three newspapers in each state in which the laws would be published. Act of Sept. 15, 1789, ch. 14, 1 Stat. 68; see also PETER HERNON ET AL., UNITED STATES GOVERNMENT INFORMATION: POLICIES AND SOURCES 339 (2002); RICHARD J. MCKINNEY, UNITED STATES STATUTES: HISTORICAL OUTLINE AND SOURCE NOTES (rev. 2008), available at <http://www.llsdc.org/assets/sourcebook/us-statutes-outline.pdf>; CULVER H. SMITH, THE PRESS, POLITICS, AND PATRONAGE: THE AMERICAN GOVERNMENT’S USE OF NEWSPAPERS, 1789–1875 39 (1977); John Spencer Walters, *Whose Vision Fulfilled? Toward a Rightful Ideological Progenitor for the U.S. Federal Depository Library Program*, 26 J. GOV’T INFO. 347, 349–50 (1999) (noting Madison’s shift in viewpoint to arranging for newspapers to publish political information).

158. Subscription rates were “low, the typical rate being for a daily ten dollars a year, and a weekly two dollars and fifty cents.” SMITH, *supra* note 157, at 10.

159. MICHAEL SCHUDSON, THE GOOD CITIZEN 67 (1998) (quoting letter of Representative John Steele to his constituents). Newspapers received discounted mailing rates from the post office to facilitate the distribution of public information. SMITH, *supra* note 157, at 6–7.

160. Perhaps needless to say, an individual’s purchase of a private bound copy of the multivolume U.S. Code would not be free of charge.

1795, the House and Senate agreed that “more general promulgation of the laws of the United States” was appropriate.¹⁶¹ As a result, Congress enacted legislation requiring that a complete edition of the laws to date, the Constitution, and current treaties, as well as newly enacted laws, be printed under the direction of the secretary of state and distributed to “each State or Territory.” The texts would be deposited in “fixed and convenient places in each county or subordinate civil division,” as the state government might judge “most conducive to the general information of the people.”¹⁶² This development coincided with a general increase in the number of libraries.¹⁶³ And by 1859, Congress had provided for the permanent retention of governmental publications by libraries and other designated depositories.¹⁶⁴ The Statutes at Large, for example, were to be distributed to “State and Territorial libraries and to designated depositories.”¹⁶⁵

In the 1930s, with an upsurge of rules, particularly the large volume of New Deal rules under the National Industrial Recovery Act, Congress recognized that administrative rules, unlike the Statutes at Large and the U.S. Code, were being published in a fashion that was disorganized and ad hoc at best, although the rules possessed the force of law and “the property and persons of the citizens may be at stake.”¹⁶⁶ As the Federal Register Act legislative history describes, Harvard Law professor (later dean) Erwin Griswold helped identify the problem and devise a solution.¹⁶⁷ By that time, there had even been litigation in which the government brought an action to enforce a regulatory requirement that turned out not to exist.¹⁶⁸

161. H.R. JOURNAL, 3d Cong., 2d Sess. 328–29 (1795) (describing Act of Mar. 3, 1795).

162. *Id.*; see also Act of Dec. 23, 1817, res. 2, 3 Stat. 473 (providing that the secretary of state must distribute a set of state papers and public documents to executives and legislatures in the “several states and territories,” as well as to “each University and College in the United States”).

163. *E.g.*, SCHUDSON, *supra* note 159, at 119 (“From 1790 to 1815, five hundred New England towns established libraries.”).

164. Act of Feb. 5, 1859, ch. 22, § 10, 11 Stat. 379, 381; see also HERNON ET AL., *supra* note 157, at 340 (discussing that the Act’s provisions transferring document responsibility from secretary of state to secretary of the interior). In 1895, Congress transferred the position of superintendent of documents from the Department of the Interior to the Government Printing Office. *Id.* at 341. On government depository libraries, including a directory, see generally *Federal Depository Library Program*, *supra* note 77.

165. Act of Jan. 12, 1895, ch. 23, §§ 54, 62, 73, 28 Stat. 601, 608, 610–20.

166. See, *e.g.*, H.R. REP. NO. 74-280, at 2 (1935) (“[R]ules and regulations frequently appear in separate paper pamphlets, some printed on single sheets of paper and easily lost. Any attempt to compile a complete private collection of [them] . . . would be wellnigh impossible. No law library, public or private, contains them all. Officials of the department issuing them frequently do not know all of their own regulations.”).

167. Griswold, *supra* note 5, at 198.

168. See, *e.g.*, H.R. REP. NO. 74-280, at 2–3 (citing *United States v. Smith*, 293 U.S. 633 (1934) (mem.)); Julius F. Stone, Jr. & George S. Pettee, *Revision of Private Law*, 54 HARV. L. REV. 221, 242 (1940); *Oil Suit Dismissed in Supreme Court*, N.Y. TIMES, Oct. 2, 1934, at 6 (following appeal, government unilaterally withdrew case of oil quota violation because relevant executive order did not contain oil quota requirement); cf. Urban Lavery, *The “Federal Register”*—Official Publication for Administrative Regulations, Etc., 7 F.R.D. 625, 626 (1947)

Congress accordingly formally expanded the publication regime to include federal agency rules beginning in 1936. Federal Register sets, as well as the CFR, are now maintained by depository libraries. Congress has repeatedly acted to expand public access to agency rules and other documents. For example, Congress expanded the publication regime to provide for free digital access at the approximately 1,200 governmental depository libraries for all federal statutes and regulations.¹⁶⁹ Congress went further in 1993, requiring the Government Printing Office to make universal online access to statutes and regulations available, defining recoverable costs as the “incremental cost of dissemination,”¹⁷⁰ a very small charge per user in the information age,¹⁷¹ and a charge barred, in any event, at depository libraries. Perhaps unsurprisingly, therefore, the Government Printing Office has elected not to impose any costs at all.¹⁷²

In 1996, in the Electronic Freedom of Information Act Amendments, Congress required agencies to make available, by “electronic means,” indices of records that have been released to the public under the FOIA, and, for records created beginning late in 1996, the records themselves.¹⁷³ Congress’s express purpose was to “improve public access to agency records and information” and to “foster democracy by ensuring public access to agency records and information.”¹⁷⁴ And in 2002, in the e-Government Act, Congress required agencies to provide for electronic rulemaking and electronic rulemaking dockets and to post on their websites a wide range of materials, with the express purposes of “increas[ing] access, accountability, and transparency” and “enhanc[ing] public participation in Government.”¹⁷⁵

(quoting Dean Wigmore on *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), in which the attorney general “admitted that the trial had proceeded below in ignorance of [the regulation] upon which the prosecution had rested” (internal quotation marks omitted)).

169. Free internet availability is provided publicly, e.g., *Federal Digital System*, *supra* note 8, as well as privately, e.g., *Legal Information Institute*, CORNELL UNIV. LAW SCH., <http://www.law.cornell.edu/> (last visited Sept. 29, 2013).

170. 44 U.S.C. § 4102(b) (2006).

171. See Bruce R. Kingma, *The Costs of Print, Fiche, and Digital Access: The Early Canadiana Online Project*, D-LIB MAG. (Feb. 2000), <http://www.dlib.org/dlib/february00/kingma/02kingma.html> (“In theory, once the fixed costs of digitization are incurred there is a zero marginal cost of providing an additional copy.”).

172. See NAT’L ACAD. OF PUB. ADMIN., *REBOOTING THE GOVERNMENT PRINTING OFFICE* 37 (2013), available at <http://www.napawash.org/wp-content/uploads/2013/02/GPO-Final.pdf> (noting that the Government Printing Office (“GPO”) elected not to charge users for access to digital content because “administrative costs of collecting payments were higher than what GPO could charge”).

173. See Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 4(7), 110 Stat. 3048, 3049 (amending 5 U.S.C. § 552(a) to require agencies to make documents available through “electronic means”).

174. *Id.* § 2(b)(1)–(2), 110 Stat. 3048.

175. See E-Government Act of 2002, Pub. L. No. 107-347, §§ 206(a)–(d), 207(f), 116 Stat. 2899, 2915–16, 2918–19 (codified as amended at 44 U.S.C. § 3501 (2006) note (Federal Management and Promotion of Electronic Government Services)).

The regular incorporation by reference of private standards into federal regulations predates Congress's move to "enhance free public access to Federal electronic information"¹⁷⁶ but is still a comparatively recent innovation, apparently beginning in the 1970s.¹⁷⁷ The SDOs have also charged for access to their standards,¹⁷⁸ although the size of the charges has not become an issue until recently.¹⁷⁹ As discussed above, neither Circular No. A-119 nor the NTTAA indicate approval of private charging for access to incorporated standards. Thus, the IBR phenomenon contrasts significantly with the general legislative trend of increasing public access to binding law. Moreover, although far less visible, agency use of IBR rules harks back in important ways to the 1930s. The privately written, federally approved industrial codes under the National Industrial Recovery Act represented a substantial regulatory contribution under the New Deal.¹⁸⁰ They were not secret by design, but these regulations, too, were nonetheless extraordinarily difficult to locate, scattered among numerous disparate locations. The often-substantial access fees SDOs charge only make that access problem worse.

B. Transparency, "Open Government," and Federal Rules

Ironically, the reduced accessibility of IBR rules has coincided with increased calls for—and a heightened public commitment to—"open government" and transparency. For example, governmental data on the quality and cost of particular schools has become more publicly available.¹⁸¹ Likewise, the public has increasingly called for disclosure of information relating to state secrets,¹⁸² warrantless surveillance,¹⁸³ and policies on drone use.¹⁸⁴ President Obama expressed a commitment to transparency immediately upon

176. See 139 CONG. REC. 4880 (1993) (statement of Sen. Ford) ("I believe this bill [the Government Printing Office Electronic Information Access Enhancement Act of 1993] goes a long way toward ensuring that taxpayers have affordable and timely access to the Federal information which they have paid to generate.").

177. See Hamilton, *supra* note 19, at 1372 ("Since 1970, Congress has produced a stream of legislation that to a greater or lesser extent contemplates the limited use of voluntary standards by federal agencies.").

178. *E.g., id.* at 1418 n.304 ("[O]ne must purchase the [Nuclear Regulatory Commission] standard from ANSI or another organization Although this preserves the private organization's publications sales, it is most inconvenient for the reader.").

179. Bremer, *supra* note 10, at 135 ("Despite its ubiquitous use, incorporation by reference in federal regulations has . . . escaped scholarly examination.").

180. See generally HAWLEY, *supra* note 94, at 55–56 (noting 1933 approval of codes for the cotton textile industry followed by the shipbuilding, wool textile, electrical manufacturing, steel, petroleum, automobiles, and lumber industries).

181. *E.g., Education*, DATA.GOV, <http://www.data.gov/education/community/education> (last visited Sept. 29, 2013) (supplying government information to the public on school quality and funding).

182. See, *e.g.*, Christina E. Wells, *State Secrets and Executive Accountability*, 26 CONST. COMMENT. 625, 640–50 (2010).

183. See, *e.g.*, Clark, *supra* note 52, at 389–406.

184. *E.g.*, Editorial, *Drone Strikes Under Scrutiny*, N.Y. TIMES, Feb. 7, 2013, at A26, available at <http://www.nytimes.com/2013/02/07/opinion/drone-strikes-under-scrutiny.html>.

taking office: "Transparency promotes accountability and provides information for citizens about what their Government is doing."¹⁸⁵

Whether IBR rules must be freely accessible to the public is a more broadly relevant topic, however, and it offers a chance to more systematically consider transparency issues. Access to IBR rules contrasts sharply with the accessibility of the U.S. Code and the CFR, both freely available to anyone online and in the over 1,200 depository libraries nationwide.¹⁸⁶ But IBR rules are also more available than other, nonlegislative governmental decisions, such as classified, top secret, or confidential documents, for which the government has prohibited unauthorized disclosure.¹⁸⁷ No claim of secrecy is made for the text of IBR rules. A *New York Times* reporter with a significant expense account, for example, could get an IBR rule's text by locating the SDO and expending the newspaper's budget on the (sometimes substantial) access fee or by purchasing a train ticket to Washington, D.C. Yet these financial burdens, together with the significant obstacles to locating the rule, may significantly hinder the potential reader.

So, how much does this matter? In the context of binding federal rules, multiple theoretical and policy perspectives make clear that the extent of access matters significantly and that the current, highly limited access is deeply problematic. Providing meaningful transparency for IBR rules ought to be understood to imply far greater access.

With respect to binding law, the arguments have centrally been about notice to those who must comply. Due process requires that regulated entities receive fair notice of their obligations before the government sanctions them for noncompliance. This due process requirement must imply some reasonable level of public access. The need for notice goes further, however. As shown by the example of IBR rules, both regulated entities and regulatory beneficiaries—those that expect to benefit from the way the government regulates others—need notice of the content of the laws. Accordingly, access opportunities must be reasonable for both regulated entities and regulatory beneficiaries.

In a democratic system, transparency also ensures some level of legal and political accountability for the exercise of governmental power. These arguments have often been phrased in rhetorical terms. The threat of exposure, for example, may deter governmental malfeasance or abuse.¹⁸⁸ And certainly, the intrepid reporter could, if she wishes, obtain access to IBR rules

185. Memorandum on Transparency and Open Government, 2009 DAILY COMP. PRES. DOC., no. 10, at 1 (Jan. 21, 2009), available at <http://www.gpo.gov/fdsys/pkg/DCPD-200900010/pdf/DCPD-200900010.pdf>.

186. See *Federal Digital System*, *supra* note 8. Session laws and individual Federal Register issues dating from the early 1990s have been made available online; previous issues may be freely viewed at depository libraries. See *id.*; *Federal Depository Library Program*, *supra* note 77 ("Anyone can visit a Federal depository library and will have access to all collections for free.").

187. E.g., Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (Apr. 2, 1982) (describing classification system).

188. See, e.g., Bentham, *supra* note 52.

for a price. In the setting of the administrative state, however, the simple threat of exposure does not provide meaningful accountability. Accountability mechanisms for federal rules both are and need to be more varied and decentralized. These mechanisms cannot function adequately if large numbers of people or entities with limited budgets face significant obstacles to reading the laws. This is so even if these materials are not formally secret. Using the frame of collaborative governance to understand IBR rules sharpens the point.

Finally, agency incorporation of standards that the public must generally pay to see sends a message that is inconsistent with core democratic values. Requiring the public to pay to see the law undermines open discussion of public affairs, equal treatment, and participation in the electoral process as a means of consenting to government and ensuring the accountability of government for its power.

1. Transparency and Notice

Take the notice issue first. Very clearly, the text of IBR materials needs to be readily, publicly accessible to give notice to those who must conform their conduct to the content of the standards. In short, regulated entities need to be able to learn their obligations easily.¹⁸⁹ As the House Committee on the Judiciary wrote, “the property and persons of the citizens may be at stake,”¹⁹⁰ and due process bars the imposition of sanctions on someone who could not have received notice of her obligations.¹⁹¹

Small businesses charged with compliance, however, have continued to complain that the prices charged by SDOs are too high for them to apprise themselves of their obligations.¹⁹² And as noted above, SDOs can even make standards effectively unavailable by no longer offering them for sale. The financial and other access barriers present real challenges for even compliance-focused businesses and, indeed, raise constitutional due process concerns.¹⁹³

189. See Cunningham, *supra* note 45, at 321 (“To the extent legal materials define rights and duties of citizens, they must be freely accessible or else run afoul of due process considerations.”).

190. H.R. REP. NO. 74-280, at 2 (1935).

191. See *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167–68 (2012) (alteration in original) (refusing to defer to agency interpretation in view of “the principle that agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires’” (alteration in original) (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm’n*, 790 F.2d 154, 156 (D.C. Cir. 1986))); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328–29 (D.C. Cir. 1995) (reaffirming fair notice requirement in civil administrative context).

192. See, e.g., *supra* text accompanying notes 80–81 (comments of truckers).

193. See *supra* note 191 (agencies must provide “fair notice” to regulated entities). To the extent that the OFR’s interpretation of “reasonably available” comes close to the constitutional line, it may not be considered authorized by the statute. *Solid Waste Agency v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172 (2001) (“Where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.”); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979).

Even when standards are available at a price that regulated entities can afford, notice concerns stretch beyond these entities. IBR standards—like all regulatory standards—also tangibly affect the “property and persons” of regulatory beneficiaries. This is certainly true for those who benefit directly from governmental action by receiving payments or vouchers for services from the government.¹⁹⁴ Pharmaceutical compendia, for example, concretely affect Medicare coverage for drugs.

And for each of the regulatory regimes described above or by other commentators, there are indirect regulatory beneficiaries, whether individuals or entities. The regulation (or lack thereof) of oil pipelines running through communities affects not just oil pipeline operators, but neighboring residents and businesses. Regulation of foods, pharmaceuticals, herbal products, automotive tires, and airplanes affects not just manufacturers, but consumers and travelers. Regulatory standards will affect the “property and persons,” in the Judiciary Committee’s words, of both regulated entities and these indirect regulatory beneficiaries.

The effect on regulatory beneficiaries is not incidental or fortuitous.¹⁹⁵ As I have discussed elsewhere, Congress passes regulatory statutes specifically aimed at guarding beneficiary interests.¹⁹⁶ This gives beneficiaries a reasonable expectation of helpful action from the agencies charged with implementing these statutes. Thus, regulatory beneficiaries, like regulated entities, should be able to learn the content of regulatory standards. One reason is that beneficiaries are entitled to participate in the development of standards and to hold agencies accountable for issuing them, as I will discuss in greater detail below.¹⁹⁷

More specifically, however, indirect regulatory beneficiaries need notice of the content of regulatory standards because those standards can affect their conduct. This is so even though regulatory beneficiaries may not be under the threat of governmental sanctions or even directly receive governmental benefits. Consumers Union, an arm of the publication *Consumer Reports*, has written, for example, that it often tests consumer products, notifies the CPSC, and “warn[s] consumers about products that do not comply with existing standards, thus creating a public safety hazard.”¹⁹⁸ For standards to play this role, however, citizens must have meaningful access.

194. E.g., Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 414 (2007).

195. Cf. Comment of A Concerned Citizen (OFR Docket Mar. 20, 2012), available at <http://www.regulations.gov/contentStreamer?objectId=0900006480fdbec2&disposition=attachment&contentType=pdf> (“Private citizens, even if they aren’t subject to a regulation, are still directly and indirectly affected by it.”).

196. See Mendelson, *supra* note 194, at 416–17.

197. See *infra* Section II.B.2.b.

198. Comment of Ioana Rusu, Regulatory Counsel, Consumers Union 2 (OFR Docket June 1, 2012) [hereinafter Comment of Consumers Union], available at <http://www.regulations.gov/contentStreamer?objectId=0900006481023c16&disposition=attachment&contentType=pdf>.

The cost of accessing standards substantially interferes with the notice regulatory beneficiaries receive of regulatory law.

Moreover, the content, not just the simple existence, of regulatory standards,¹⁹⁹ might prompt parents to buy—or not buy—certain toys or infant carriers; consumers to buy—or not buy—rice that contains some level of arsenic; people considering employment in an OSHA-regulated paint booth to work there—or not; and residents to drink filtered or bottled water depending on the stringency of tap water standards.²⁰⁰ As an individual commenter wrote to the OFR, “I don’t have to follow any laws about the design of airbags, but I have a right to know against what standards they are evaluated.”²⁰¹ A neighbor might, for example, view nuclear facility or oil pipeline standards, even if complied with, as inadequately protective and still choose to relocate. Thus, a regulatory standard can both affect the quality of choices facing beneficiaries and function as a form of information disclosure regarding these choices. The content of the standard directly impacts the interests of regulatory beneficiaries. Accordingly, if notice is to be effective, meaningful public access must be provided to anyone potentially affected by the law, not just to those who must comply.²⁰²

2. Accountability for Legislative and Quasi-legislative Actions

In addition to the need for both regulated entities and regulatory beneficiaries to have notice of the content of IBR standards, regulatory standards also need to be readily and publicly available so that citizens can hold the

199. This would include an assessment that regulated entities are likely to comply with binding standards; if compliance were not assured, regulatory beneficiary behavior might, of course, change further still.

200. For example, lack of access might prevent consumers from making informed decisions on whether to drink tap water when an agency relies on privately specified methodologies to test water sources. *E.g.*, 40 C.F.R. § 141.21(f)(8) (2012) (drinking water standards incorporating numerous private standards for measurement of fecal coliform bacteria by reference).

201. Comment of A Concerned Citizen, *supra* note 195.

202. Some might argue that mediating organizations such as newspapers or nongovernmental organizations might provide consumers or other individual beneficiaries with information even if the individual beneficiaries cannot afford access. This is possible, of course, but it is not a universal solution. Newspapers are limited in terms of both budgets and space; they are unlikely to report either the content or the range of issues potentially raised by the over 9,000 SDO rules. Nongovernmental organizations need financial support and they underrepresent diffusely held preferences among large groups of individuals. In theory, individuals whose budget constraints preclude them from accessing SDO standards could pool their funds to enable a nongovernmental organization to purchase the standards and report issues to them. But the organizational challenges and free-rider problems surrounding such an effort are substantial. Public.Resource.Org, for example, ran a Kickstarter campaign to raise \$100,000 to purchase (and publish directly) SDO rules; although the campaign did attract several hundred participants, the organization only raised about a third of what it sought. See Carl Malamud, Public.Resource.Org, *Public Safety Codes of the World: Stand up for Safety!*, KICKSTARTER, <http://www.kickstarter.com/projects/publicresource/public-safety-codes-of-the-world-stand-up-for-safe/posts/641022> (last updated Oct. 25, 2013).

government accountable both for complying with the law and for devising it.

Perhaps to state the obvious, regulatory standards (as well as statutory standards) are among the longest-lasting, highest-impact exercises of power by government. They cover virtually every area of governmental power, apply to entire classes of entities and individuals, and have prospective, legally binding effect until the government takes further action to repeal them. As a group, then, legislative and quasi-legislative actions are the core activities that distribute the benefits and burdens of government.

As with any governmental action, the development of regulatory standards is susceptible to abuse and malfeasance. These problems can range from an agency's imposition of arbitrary requirements²⁰³ to the issuance of rules aimed at benefiting something—or someone—other than the public interest. Accountability is thus critical to deterring agency violations of law and arbitrariness, to safeguarding against “capture” or the undue influence of any particular subgroup,²⁰⁴ to inhibiting reliance on inadequate or biased information, and to addressing a range of other governance problems. In addition, agencies need to be accountable for implementing their statutorily delegated authority, carrying out the programs Congress created. Both regulated entities and regulatory beneficiaries have a stake in proper agency implementation of statutory programs. Finally, accountability mechanisms help ensure that agencies, whose top officials are not elected, nonetheless make democratically responsive decisions.

IBR rules are not formally secret. Their cost and the difficulty of accessing them, however, represent significant impediments to accountability. Assessing whether public access is sufficient to ensure accountability requires considering the nature of the governmental action, how accountability mechanisms should function, and who requires access to invoke those accountability mechanisms. In the IBR setting, several considerations make clear that meaningful access must be broadly available to the public, not simply to those who can afford the cost of the standards charged by the SDOs.

a. *Transparency, Consent, Voting, and Public Discussion*

At the highest theoretical level, the notion that laws must be transparent to the public can first be grounded in a notion of popular sovereignty—if “the people” delegate power to the government, the actions the government

203. See, e.g., Michael M. Grynbau, N.Y. TIMES, *Court Halts Ban on Large Sodas in New York City*, Mar. 12, 2013, at A1 (noting a judge's decision to overturn the New York Board of Health's “soda ban” as “arbitrary and capricious”), available at <http://www.nytimes.com/2013/03/12/nyregion/judge-invalidates-bloombergs-soda-ban.html>. See generally Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2004).

204. See generally Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010).

takes must be open to the public.²⁰⁵ Otherwise, consent to be governed—however it may be communicated—cannot be meaningful.²⁰⁶ If we focus on voting (more on this below), a citizen cannot cast an informed vote regarding incumbents without access to information regarding governmental actions. And if we take a more deliberative understanding of government, governmental reasoning and decisionmaking must be readily available to the public as a predicate for public discussion.²⁰⁷ These notions apply equally to any sort of governmental exercise of power, whether it is focused on a single case or broadly to an entire class.

For legislative and quasi-legislative decisions in particular, these democratic mechanisms are the key safeguards against governmental malfeasance. For example, unlike criminal and civil enforcement proceedings, no constitutional due process requirements attach to the enactment of statutes or the promulgation of rules. As Justice Holmes reasoned in *Bi-Metallic Investment Co. v. State Board of Equalization*, “Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption.”²⁰⁸ It surely is impractical. Accordingly, individuals potentially affected by, say, the preparation of an automotive safety rule generally do not receive individual notice or an opportunity to be heard.²⁰⁹ (And indeed, they could only take advantage of such opportunities if they could readily learn what was at issue.)

Legislative rules are also understood to require fewer individualized procedural safeguards because they apply to classes, rather than individuals, and these groups can band together to exercise political power.²¹⁰ As Holmes observed, given the practical obstacles that would attend hearing rights, the “only way” to protect the rights of an individual against the potential of state

205. E.g., CIRCULAR NO. A-130, *supra* note 75, para. 7(c) (“The free flow of information between the government and the public is essential to a democratic society.”).

206. Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 896 (2006) (“Liberal philosophers who assume a contractual relationship between government and its citizens presume that openness enables individuals to grant their informed consent to be governed.” (citing JOHN RAWLS, *A THEORY OF JUSTICE* 16, 454 (1971))); David Mitchell Ivester, Note, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109, 116 (1977) (“[T]he right to know is implicit in the structure of a self-governing system. The sovereign people, by virtue of their station as the fundamental source of all governmental power, have an inherent right to know what their government is doing.”).

207. Fenster, *supra* note 206, at 902.

208. 239 U.S. 441, 445 (1915).

209. See *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 284 (1984). Administrative experimentation with formal rulemaking under the Administrative Procedure Act, 5 U.S.C. §§ 553, 556–57 (2012), in which interested parties do receive an opportunity to be heard in a trial-type hearing (if not personalized notice), has been largely abandoned after formal rulemaking turned out to be extremely cumbersome and time-consuming. See, e.g., STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 548–49 (7th ed. 2011) (noting that there is a “gathering consensus” against formal rulemaking).

210. In addition, in the legislative setting, imposing procedural requirements raises the unpleasant specter of judicial interference with a coordinate and coequal branch of government. See, e.g., *Minn. State Bd.*, 465 U.S. at 284–85. Due process, however, of course applies to any effort to enforce these standards or extract fines or penalties for noncompliance.

power to affect her person or property would be through the power of individuals “immediate or remote, over those who make the rule.”²¹¹ Holmes was probably referring to the power to vote, and in the context of federal agencies, the vote means, primarily, the presidential election.²¹²

This is not to say that limited public access around more narrowly focused governmental decisions is acceptable—that issue is beyond the scope of this Article.²¹³ However, with respect to legislative and quasi-legislative decisions, public access clearly cannot be incidental, occasional, or selective. Instead, citizens must have widespread and easy access to the relevant legislative and quasi-legislative decisions. Conceivably, an energetic reporter, particularly one based in Washington, D.C., could read some of the thousands of IBR rules and decide to cover the issues, prompting public debate. But in general, the access costs that SDOs charge burden reporters as well as individuals. And the prospect of occasional newspaper coverage on topics selected by a reporter cannot be a substitute for a voter’s opportunity to become informed on governmental lawmaking.²¹⁴ Thus, even if these documents are not formally secret, the substantial obstacles to public accessibility undermine the potential of voting or public deliberation as a means of accountability.

Elections, whether for the president or for Congress, represent a far-from-perfect means of communicating citizen views on either statutes or regulatory decisions; elections are infrequent, choices are limited, and voter preferences may not be well formed at the time of election.²¹⁵ But elections cannot function at all as a means of accountability for legislative or quasi-legislative decisions if an interested citizen cannot readily discover the content of these decisions.

b. *Agency Decisionmaking and Procedures as an Accountability Mechanism for IBR Rules*

As Professor Farina has observed, “No single mode of democratic legitimation can serve to mediate between the conflicted, protean, often inchoate will of the people and the modern regulatory enterprise.”²¹⁶ Thus, our current system relies on a set of accountability mechanisms for agency rules, including rulemaking procedures, oversight, and judicial review, that go far

211. *Bi-Metallic Inv. Co.*, 239 U.S. at 445.

212. See *infra* note 296 and accompanying text.

213. Cf. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982) (explaining that the First Amendment required opening a criminal trial to both the press and general public).

214. Similarly, the prospect that a nongovernmental organization might supply information on some SDO rules to the public is not a substitute for the ability of an interested individual to read the rule that is of interest to her.

215. See generally Nina Mendelson, Foreword, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1352–53 (2011).

216. Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 988 (1997).

beyond the indirect control of the electoral process. Meanwhile, agency incorporation of private standards, a form of collaborative governance, can present distinctive pitfalls. I turn to these issues and the accompanying need for meaningful public availability of the text of agency rules, including privately drafted rules.

i. The Use of IBR Rules as a Form of Collaborative Governance

Incorporation by reference of private standards is only one of a growing group of governmental actions that enlist private entities and institutions in public governance functions. Such “collaborative governance” ranges from self-regulation to private accreditation organizations that certify organic food²¹⁷ to the privatization of prisons.²¹⁸ Collaborative governance presents well-recognized challenges for accountability regimes.²¹⁹ In the outsourcing setting, for example, private actors may be subject to fewer restrictions, including procedural and ethics requirements, than their governmental counterparts.²²⁰ On occasion, as Professor Michaels has written, government may enlist private parties with the goal of avoiding these same restrictions.²²¹ The SDO process represents a collaborative approach to rulemaking, but not one governed by contract. One insight offered by the collaborative governance literature is that these sorts of departures from conventional decisionmaking modes, such as legislating or rulemaking, require a thoughtful approach to accountability. To assure that, ultimately, decisions are both democratically responsive and well reasoned, accountability regimes need to be sensitive to the particular characteristics of the collaborative arrangement. These characteristics can include the identity of the persons and institutions involved, the decisionmaking procedures they use (and who controls the details and functions of those procedures), who has a stake in the decision, and how the institutions relate to each other, together with the particular risks faced in the process of collaboration.²²² And these mechanisms of accountability, in turn, require a thoughtful approach to transparency and public access.

217. See LESLEY K. MCALLISTER, *THIRD PARTY PROGRAMS TO ASSESS REGULATORY COMPLIANCE* 33–38 (2012), available at http://www.acus.gov/sites/default/files/documents/Third-Party-Programs-Report_Final.pdf; Chenglin Liu, *Is “USDA Organic” a Seal of Deceit?: The Pitfalls of USDA Certified Organics Produced in the United States, China and Beyond*, 47 STAN. J. INT’L L. 333 (2011).

218. See generally Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149 (2010).

219. See generally GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Minow eds., 2009).

220. See generally Kathleen Clark, *Ethics, Employees and Contractors: Financial Conflicts of Interest in and out of Government*, 62 ALA. L. REV. 961 (2011).

221. Agencies may sometimes rely on private entities to “work around” public-interested constraints that would otherwise apply, including disclosure, procedure, and substantive constraints. See generally Jon D. Michaels, *Privatization’s Pretensions*, 77 U. CHI. L. REV. 717 (2010).

222. E.g., Freeman, *supra* note 126, at 549 (proposing an approach of “‘aggregate’ accountability,” including considering formal and informal mechanisms “emanating not just

For example, Professor Clark has recently argued that secrecy hindered accountability for legal violations in the executive branch in the Bush Administration's warrantless surveillance program that ran from 2001 to 2007. She argues that "multiple overlapping accountability mechanisms" might have deterred violations of law in this program. These mechanisms included Office of Legal Counsel opinions, inspector general processes, and other internal procedures, along with congressional committee investigations.²²³ Every element of this apparently robust system of accountability for individual warrantless surveillance decisions, however, shared a "dependence on information"²²⁴—information that was very difficult to get because of claims that national security required secrecy.²²⁵

In the context of incorporating privately drafted rules by reference, the central accountability issue is ensuring—even while the government saves resources and utilizes valuable private sector expertise—that the government makes proper use of incorporated material and that adopted standards do, in fact, protect the public interest as required and defined by statute. Like any duly promulgated agency rule, then, an SDO standard that an agency incorporates by reference ought to be justified by proper reasons and be democratically responsive.²²⁶ And we must also consider who should be able to invoke these accountability mechanisms and how effective they are.²²⁷ In the IBR setting, the affected parties seeking accountability include both regulated entities and those who expect to benefit from the way the government regulates others.²²⁸

ii. Rulemaking Pitfalls, the Use of IBR Rules, and the Lack of Public Access

A key form of accountability for agency rules is, of course, the agency rulemaking process itself. As discussed, that process can prompt the agency to ventilate a range of issues, including issues raised by the public in comments, and to prepare an explanation—the "concise general statement of their basis and purpose"—of the choices made.²²⁹ The process of rulemaking and the record the agency creates can in turn facilitate meaningful judicial review. Agencies use rulemaking to adopt SDO rules that will be incorporated by reference. Thus, in theory, rulemaking could serve as a sort of quality assurance for incorporated SDO rules.

from government supervision, but from independent third parties and regulated entities," and addressing both particular risks and distinctive capacities of involved parties).

223. Clark, *supra* note 52, at 404–07.

224. *Id.* at 404.

225. *Id.*

226. See *supra* text accompanying notes 203–204.

227. See Jerry Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in *PUBLIC ACCOUNTABILITY: DILEMMAS, DESIGNS, AND EXPERIENCES* 115 (Michael Dowdle ed., 2006).

228. See Mendelson, *supra* note 194, at 416–17.

229. 5 U.S.C. § 553(c) (2012).

Under the best of circumstances, however, the potential of rulemaking to air the relevant issues and to reveal agency reasoning is a limited one. Particularly given the limitations of SDOs' internal processes, an agency's reliance on SDOs to develop a rule for incorporation can worsen the difficulties. Widespread public access to agency rulemaking is thus critical for the process to provide any meaningful assurance that standards chosen will be well reasoned and democratically responsive.

First, even when under agency control from start to finish, the rulemaking process is far from risk-free. Even the most publicly focused regulatory official, in an agency-led regulatory process, may lack full information. The agency tendency has been toward dependence on the information and cooperation of regulated industries. Regulated industries may, as a practical matter, have greater informal access to agency decisionmaking processes, raising concerns about "capture" and information gaps.²³⁰ For example, it is widely documented that so-called regulatory beneficiaries tend to be underrepresented in agency proceedings because they are less well organized and may have less political clout. Moreover, agencies may simply be less aware of their identities than those of regulated entities, with whom they have repeated interactions in gathering information and assessing compliance with agency rules.²³¹ This underrepresentation can be particularly problematic during the so-called "pre-notice" period, understood to be a key time for rulemaking. The core of an agency's rule proposal will be developed informally and internally prior to the publication of the Notice of Proposed

230. See Mendelson, *supra* note 194, at 424–33; Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 86 (2012) ("[N]otice and comment is typically dominated by a limited number of high-caliber professional interest groups and industry representatives.").

231. Mendelson, *supra* note 194, at 427; Richard Murphy, Essay, *Enhancing the Role of Public Interest Organizations in Rulemaking Via Pre-notice Transparency*, 47 WAKE FOREST L. REV. 681, 689–91 (2012) (noting the vast disparity between industry and beneficiary communications with the agency); Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 102 (2011) [hereinafter Wagner et al., *Rulemaking in the Shade*]; see also Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 464 (1999) (noting that regulated entities typically have an "advantage in influencing agency decisions" because they have the "incentive and means to monitor what the agency does on a day-to-day basis" and "information without which a regulatory agency cannot do its job"); Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1417 (2010) (suggesting that agencies raise the public visibility of certain rulemaking procedures as a mechanism to increase public participation) [hereinafter Wagner, *Administrative Law*].

Rule.²³² During that period, regulated entities may have disproportionate influence within the agency.²³³ The presence of an agency official's ulterior motive could worsen the problem.²³⁴

Once an agency has published a proposed rule in the Federal Register, it administers a notice-and-comment process that is formally open to any "interested person."²³⁵ People are entitled to submit comments and, under current case law, to have agencies respond to significant comments.²³⁶ In addition, any "interested person" can petition an agency to revise or repeal a rule.²³⁷ Both regulated entities and regulatory beneficiaries, as well as generally interested members of the public, can use these mechanisms to demand reasons from the agency regarding the agency's decision to adopt—or not adopt—a particular rule. This process has been praised as making the administrative state a far more "civic republican" entity than other American institutions.²³⁸

Even for standards an agency itself develops, with full data disclosure in the rulemaking process, however, this formally open process can be flawed. For example, an agency may, as a practical matter, have committed to certain regulatory approaches during the pre-notice period while ruling others out. Comments may thus be less likely to provoke a genuine change in the agency's thinking. This precommitment issue is problematic because, as noted, the agency may disproportionately receive (or solicit) feedback from some quarters during the pre-notice period.²³⁹

232. E.g., Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589, 600–01 (2002) (noting that a variety of sources, including industry insiders, lawyers, and empirical studies, agree that pre-notice contacts can be more effective in influencing agency policy than post-notice comments).

233. Wagner et al., *Rulemaking in the Shade*, *supra* note 231, at 102; *see also* Murphy, *supra* note 231, at 689 (during the pre-notice period, EPA officials had an average of 178 contacts per rule with interested parties; 170 were with regulated parties, and the remaining contacts were mainly from states, with fewer than one contact on average with public interest groups).

234. Public choice theories of agency official behavior posit, for example, that an agency official may be "tempted to curry favor with prospective employers or clients while still employed by the government." Christopher N. Camponovo, *Indecent Proposal: Abraham Sofaer, Libya, and the Appearance of Impropriety*, 21 J. LEGAL PROF. 23, 27 (1997); Marc T. Law & Cheryl X. Long, *What Do Revolving-Door Laws Do?*, 55 J.L. & ECON. 421, 421 (2012) ("Plans to pursue a subsequent career in the private sector may induce current public employees (for instance, regulators) to treat potential private sector employers favorably.").

235. Administrative Procedure Act, 5 U.S.C. § 553(c) (2012).

236. *Id.*; *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393–94 (D.C. Cir. 1973) (noting that agencies must respond to comments that "step over a threshold requirement of materiality").

237. 5 U.S.C. § 553(e).

238. Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992).

239. *See supra* text accompanying notes 231–233.

These procedural difficulties increase when the agency chooses to incorporate a standard developed by a private SDO. Again, some SDOs are formally composed of experts or professionals. Others, however, may be organized expressly to protect regulated industry interests. Meanwhile, an SDO may function through relatively closed procedures.²⁴⁰ These characteristics raise concerns about whether SDO standard drafters will be overly dependent on information from a narrow category of stakeholders.

Moreover, many laws that constrain agencies simply do not apply to SDOs. This raises the risk that an SDO standard will diverge from public goals. To begin with, it is difficult to tell what criteria an SDO drafting “safety” standards is asked to achieve. For example, ANSI standard A14.5-2007 for ladders states that it is aimed at “safe construction, design, testing, care, and use of portable reinforced plastic ladders.”²⁴¹ It is unclear whether this objective is intended, as the OSHA requirements are, to “assure so far as possible every working man and woman in the Nation safe and healthful working conditions,”²⁴² or even to create standards “reasonably necessary or appropriate to provide safe or healthful employment.”²⁴³

Other laws intended to ensure the integrity of agency processes do not apply to SDOs. For example, ethical requirements do not apply. As Professor Clark has recently detailed, “A criminal statute prohibits Executive Branch officials from participating in matters that would affect their own financial interests or the financial interests of family members[or] organizations with which they are associated Employees must recuse themselves from participating even when they have only small financial interests at stake.”²⁴⁴ The presence of a financial interest would not limit an individual or company from filing a public comment either to an SDO or directly to an agency on a draft rule. But no ethical restrictions apply to SDO employees engaged in drafting.²⁴⁵ So, for example, it is largely up to internal self-regulation whether members in the American Public Health Association who draft drinking water test requirements or automotive engineers who draft safety

240. See, e.g., Comment of Nat’l Tank Truck Carriers, *supra* note 73, at 2 (expressing concern that with incorporation by reference, “an open rulemaking process would be replaced by the need to work through the publication parties to initiate changes”); *supra* text accompanying notes 95–128; *supra* note 221 and accompanying text (on Michaels’s argument on the government’s use of privatization as a “work-around”).

241. Standard available at ANSI ASC A14.5-2007, AM. NAT’L STANDARDS INST., http://webstore.ansi.org/RecordDetail.aspx?sku=ANSI+ASC+A14.5-2007&source=safety_landing#.UUcs8Bzvt8E (last visited Sept. 29, 2013).

242. 29 U.S.C. § 651(b) (2006).

243. 29 U.S.C. § 652(8); see *supra* text accompanying notes 129–132.

244. Clark, *supra* note 220, at 968–69.

245. See *id.* at 969–70.

standards for the Society for Automotive Engineers can have a pending patent application or a financial investment that could be affected by a standard's content. Meanwhile, SDOs themselves often derive substantial support from industry membership fees.²⁴⁶

Further, although SDOs may strive to implement detailed internal processes for standards development and drafting, SDOs are not subject to the FOIA or the APA because those statutes apply only to "agencies."²⁴⁷ So the APA's public participation requirements for rulemaking do not apply, and neither do the APA's or the FOIA's requirements of explanation and data disclosure.²⁴⁸ The extent to which there will be participation, explanation, or disclosure is left up to the SDO. Finally, APA constraints do not apply to an SDO's revocation of its standards, although they would clearly bind an agency to amend or repeal an existing rule through established rulemaking procedures.²⁴⁹

As a practical matter, opportunities for the ordinary citizen to participate in SDO processes are limited, and participation is significantly more difficult than in the agency process. Some SDOs, notably ASTM, do outline procedures that, formally, invite wide engagement and that aim, ambitiously, to provide a balance of viewpoints in the decisionmaking process.²⁵⁰ Realistically, however, one may have to "pay to play" in SDO processes, whether it is by joining the group or traveling to a meeting to participate in person.²⁵¹ At least one SDO, the NAESB, has described its "balanced process" as "balanced . . . by market segment" of industry, and inclusive with respect to those who may have to "implement" standards it develops.²⁵² It is unclear whether this balance extends at all to participation by regulatory beneficiaries and the general public. Further, having to purchase the draft standard—or the underlying standard if amendments are being considered—often represents a substantial financial obstacle to participation. Finally, figuring out which of many SDOs may be developing relevant standards, what sorts of processes they are running, and how to participate

246. See, e.g., N. AM. ENERGY STANDARDS BD., MEMBER HOMEPAGE ACCESS FORM (n.d.), available at <http://www.naesb.org/pdf/Homepage.pdf> ("Members have access to the work products on the protected areas as part of their membership benefits."); Comment of Am. Nat'l Standards Inst., *supra* note 33, at 2 ("Some organizations receive revenue through membership support . . ."). Membership to the North American Energy Standards Board costs \$7,000 per year. N. AM. ENERGY STANDARDS BD., MEMBERSHIP APPLICATION (2011), available at <http://www.naesb.org/pdf4/naesbapp.pdf>.

247. See 5 U.S.C. § 551(a) (2012) (defining "agency"); *id.* § 552 (applying information disclosure requirements to agencies); *id.* § 553 (applying rulemaking requirements to agencies). In addition, the Federal Advisory Committee Act does not apply to SDOs. See Federal Advisory Committee Act, 5 U.S.C. app. §§ 1–16.

248. See 5 U.S.C. § 553 (requiring notice-and-comment process and "concise general statement of their basis and purpose").

249. *Id.* § 551(5) (defining "rule making" to include "agency process for formulating, amending, or repealing a rule").

250. See, e.g., *supra* text accompanying notes 110–115 (ANSI standards).

251. Strauss, *supra* note 2, at 541; see *supra* text accompanying notes 105–108.

252. Comment of N. Am. Energy Standards Bd., *supra* note 45, at 1.

may tax the informational and financial resources of a citizen, a business, or even a small organization. Small businesses complained about just this problem when Congress enacted the NTTAA.²⁵³ In short, the SDO processes simply cannot be viewed as an effective substitute for the participatory and reason-giving requirements provided by agency rulemaking.

So, might an agency's notice-and-comment rulemaking process prior to incorporating an SDO standard compensate for the lack of SDO process? Unfortunately, if an interested citizen or entity has not been able to participate in the SDO process, the chance of having the agency meaningfully consider these views in the rulemaking process seems smaller still. The lack of meaningful public access hinders rulemaking from compensating for the procedural difficulties of the SDO process.

First, in the agency rulemaking process, the rule itself and the data supporting the rule may be copyrighted by the SDO and available only on payment, limiting the usefulness of the comment opportunity.²⁵⁴ Further, as Bremer makes clear, under many circumstances the IBR determination is not made until the final rule stage, further limiting the comment opportunity.²⁵⁵ Once an agency has made the final decision to incorporate a rule, the IBR material, again, is typically available only on payment to the SDO; this would obviously impede an "interested person" from invoking the petition process to ask the agency to repeal or revise the rule.²⁵⁶ For example, the National Tank Truck Carriers filed a comment noting these barriers to comment in the agency rulemaking process on IBR rules on hazardous materials transportation.²⁵⁷

Moreover, agency precommitment issues are likely to be even worse for SDO rules than for agency-drafted rules. This is because the material has been fully developed and drafted elsewhere, as well as "endorsed" by the developing group as a package. And as noted above, the purpose of both Circular No. A-119 and the NTTAA was to reduce complexity from governmental standards that overlap with, but that cover largely similar ground to, privately developed standards. This is not to say that agencies will automatically incorporate a private standard if one is available.²⁵⁸ But agencies would

253. See *supra* note 123.

254. See, e.g., *supra* note 135–138 and accompanying text.

255. See Bremer, *supra* note 10, at 144 ("OFR does not get involved in evaluating an incorporating regulation until it is final and ready to be promulgated.").

256. 5 U.S.C. § 553(e) (2012).

257. See Comment of Nat'l Tank Truck Carriers, *supra* note 73, at 2 (noting that an SDO was initially permitted to charge for access to IBR standards undergoing notice and comment, but following a complaint, PHMSA ultimately "required the two private agencies to make portions of their copyrighted publications available electronically while the comment period was open").

258. E.g., MARY F. DONALDSON & NATHALIE RIOUX, NAT'L INST. OF STANDARDS AND TECH., NISTIR 7789, FOURTEENTH ANNUAL REPORT ON FEDERAL AGENCY USE OF VOLUNTARY CONSENSUS STANDARDS AND CONFORMITY ASSESSMENT 3 (2011), available at https://standards.gov/NTTAA/resources/nttaa_ar_2010.pdf (cataloging forty-eight uses of government-unique standards in lieu of private sector standards).

seem to have a strong incentive, if they are going to adopt IBR standards at all, to adopt them as a whole, rather than tweaking them. Modifications to SDO standards might be criticized as creating complexity and duplication, contrary to the purposes of Circular No. A-119 and the NTTAA. Indeed, digital searching in the CFR for private IBR standards that have been modified or changed seems to confirm this incentive for agencies. Searching has identified only eighteen agency rules, out of thousands, in which an agency both incorporated private SDO standards and modified them to some degree.²⁵⁹ This suggests that agencies may be reluctant to respond to comments by revising SDO standards they are proposing to incorporate by reference.

I do not wish to suggest that public standard setting will generally be superior to private standard setting. Public standard setting can have its own difficulties, ranging from agency tunnel vision²⁶⁰ to decisions made by officials whose personal motivations conflict with the public interest.²⁶¹ And although the problem may be more moderate compared with the SDO setting, unbalanced participation of interested parties remains an issue in the public setting.²⁶² Meanwhile, private processes can offer important expertise and services to agencies. But there are surely significant potential pitfalls in this collaborative governance process, and they underscore the importance of ensuring that we have functional accountability mechanisms.

Agency rulemaking depends on inviting “any interested person” to participate. For it to serve as a functional accountability mechanism when an agency elects to incorporate an SDO standard, the SDO standard has to be meaningfully available, as does the data supporting it. During the comment period, the SDO rule may not even be available in the OFR; the only way to obtain it may be by contacting the SDO and paying a fee. That the rule is not formally secret does not suffice; the fees charged by SDOs obviously obstruct public access and undermine rulemaking’s potential as an accountability mechanism.

c. *Internal Accountability: Agency Adoption of SDO Standards*

As Professor Mashaw points out, however, accountability for public governance regimes need not always fit the conventional mold of an agency preparing to present its reasoning in a judicial review process invoked by

259. In March 2013, the following Westlaw search was performed in the CFR database: “(incorp! /2 reference) /s (modif! change).” The search turned up 137 documents, seventeen of which represented agency modifications of an incorporated private SDO standard. Six of the regulatory modifications relate to the ASME Boiler and Pressure Vessel Code; eleven relate to other SDO standards. Search results are on file with the author. Additionally, shortly before this piece went to press, the CPSC incorporated an SDO standard on infant carriers which the agency modified somewhat. See *supra* note 72 (on infant carrier standards).

260. E.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* 11–19 (1993).

261. Shapiro, *supra* note 126, at 399 (noting that agency officials may seek to maximize “money, security, status, and policy that may or may not align with the interests of Congress”).

262. E.g., Mendelson, *supra* note 194, at 424–33; cf. Freeman, *supra* note 126, at 558 (noting the extent to which private actors already permeate the public sector).

outsiders. One might object, then, that we should take a wider frame and consider other mechanisms that require an entity—such as the SDO—to account for its actions according to some standard or set of preferences, and in which consequences flow if the action does not measure up.²⁶³

Thus, a possible internal accountability mechanism could be the agency's decision whether to utilize the SDO standard at all. An agency official who views the substance of an SDO standard as inadequate or the SDO's standard-issuing process as flawed could simply decline to propose incorporation by reference and instead develop a standard in-house. (If the declined standard could be characterized as a voluntary consensus standard, however, the official would have to file an explanation of reasons with the OMB²⁶⁴ and the National Institute of Standards and Technology.²⁶⁵) The agency official's role might be likened to that of a supervisor in a hierarchical management structure. The supervisor's control over subordinates, as Mashaw points out, may operate as a safeguard against malfeasance.²⁶⁶ If such a mechanism were to be effective, perhaps outside accountability mechanisms—and the public access to IBR rules that would be required to support them—would be less necessary.

On closer analysis of institutional incentives, however, this decisionmaking seems insufficient to provide the needed accountability. This is because agency officials face significant incentives to rely on IBR material even when IBR standards are not ideal from the standpoint of statutory implementation and do not serve, in Freeman's words, "the ultimate consumer"²⁶⁷—including substantive IBR standards that might be considered "politically contentious."²⁶⁸

A first worry is that incorporation by reference of SDO rules could be a mechanism for regulated entities, through SDOs they dominate, to "capture" agency officials. Again, "capture" is a term with myriad meanings, encompassing (but not limited to) the situation in which agencies "depend too much on the industries they regulate for information, political support, or guidance."²⁶⁹ If this circumstance is present, SDO rules could amount to a supply for agencies of regulated-entity-friendly, rather than public-interested, rules. "Captured" agency officials could elect to adopt such standards wholesale. Relying on agency decisionmaking obviously then would not guard against poor SDO standards.

263. See Mashaw, *supra* note 227, at 117–20.

264. CIRCULAR NO. A-119, *supra* note 60, para. 6(d).

265. National Technology Transfer and Advancement Act of 1995 § 12(d)(3), 15 U.S.C. § 272 note (2012) (Utilization of Consensus Technical Standards by Federal Agencies).

266. Mashaw, *supra* note 227, at 120.

267. Freeman, *supra* note 126, at 605 (noting that "[e]ven a well-meaning agency may be torn between competing goals," and its interests "may not (and often will not) coincide with that of the ultimate consumer").

268. Comment of Am. Petroleum Inst., *supra* note 25, at 4 (characterizing IBR rules subject to OFR supervision).

269. Nicholas Bagley, Response, *Agency Hygiene*, 89 TEX. L. REV. See Also 1, 5 (2010), available at <http://www.texaslrev.com/wp-content/uploads/Bagley-89-TLRSA-1.pdf>.

Agency motivations are undoubtedly far more complex, as are the products of SDO processes. Even without “capture,” however, as then-Professor Kagan observed, “[F]ew could argue with [interest group theory’s] basic insight—that well-organized groups ha[ve] the potential to exercise disproportionate influence over agency policymaking by virtue of the resources they command[], the information they possess[], and the long-term relations they maintain[] with agency officials.”²⁷⁰

For an agency official, an SDO rule represents the packaging of interest group resources, expertise, and information in an extraordinarily usable form.²⁷¹ Even the most public-interested agency official,²⁷² then, is likely to be interested in the significant resource savings from adoption of SDO rules, including rules that represent less-than-perfect implementation of statutory commands. Issuing a rule requires time, resources, and the development and application of internal expertise (which itself requires time and resources). Agencies often seek private sector assistance on regulatory standards through contracts with consultants. SDO standards represent a supply of fully drafted standards informed by private sector expertise and, often, privately developed supporting data.²⁷³ The agency receives the work without the financial obligation of a contract, although agencies may still supply some financial support to an SDO.²⁷⁴ And although an agency must still generally evaluate the SDO standard prior to proposing incorporation and convene a notice-and-comment process, that process typically represents only a portion of the processes required to develop a rule.²⁷⁵

Further, the internal ability of agencies to oversee the standards—and to decline to incorporate them—can be inhibited by a number of factors. A

270. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2265 (2001).

271. *E.g.*, Bremer, *supra* note 10, at 140 (“Using voluntary consensus standards . . . allows agencies to capitalize on considerable expertise and resources available outside government.”).

272. This, of course, assumes that agency officials themselves want standards that serve the public interest; to the extent that they have other motivations, such as maximizing opportunities for later private sector positions at an SDO or a regulated entity, the problem is worse still. *Cf.* Shapiro, *supra* note 126, at 399–400 (in analyzing government “outsourcing,” assuming agency regulators generally want to accomplish congressional goals).

273. *E.g.*, Requirements Pertaining to Third Party Conformity Assessment Bodies, 77 Fed. Reg. 31,086 (proposed May 24, 2012) (to be codified at 16 C.F.R. pts. 1112, 1118) (noting that ASTM is in possession of studies supporting XRF technology).

274. See CIRCULAR NO. A-119, *supra* note 60.

275. *E.g.*, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-295, FEDERAL RULEMAKING: IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS 13 (2009), available at <http://www.gao.gov/new.items/d09205.pdf> (stating that, in addition to the extensive work required to develop a proposed rule, “[a]gency officials reported that . . . initial [pre-proposal] work on a rule is of indeterminate length and sometimes constitutes a major portion of the process”); *cf.* Comment of Am. Petroleum Inst., *supra* note 25, at 3 (“In the event that a private standards development organization declined to make its standards available online for free . . . the rejection of the incorporation by reference would force the regulatory agency to either refrain from rulemaking or expend agency time and resources to duplicate already existing private resources.”).

significant appeal of using private standards is that they permit agencies to build on private expertise, rather than having to pay the costs of developing extensive in-house expertise. By the same token, however, if more expertise in fact resides in the private sector, the agency may find it costlier to fully evaluate whether the privately developed standard meets public goals.²⁷⁶

Moreover, once an agency has developed a pattern of relying on privately generated standards, an agency may find it more difficult to modify or reject those standards, even if that is otherwise advisable, because the process of devising or locating replacement standards may have a higher initial cost than if the agency had a well-established regulatory program of its own.²⁷⁷

Besides potential resource savings, pragmatic political concerns also may nudge an agency to adopt an SDO standard rather than draft a “government-unique” standard. To the extent that regulated entities play important roles in developing SDO rules and SDO rules track regulated entity preferences, agencies might expect less resistance to the rule and greater compliance.²⁷⁸ For example, SDO standards might reflect regulated entities’ currently adopted technologies and thus correlate with higher levels of compliance than, say, a performance standard that is effectively technology forcing.²⁷⁹ For an analogous example, Strauss describes the efforts of American firms attempting to establish a U.S.-focused standard for optics as an International Standards Organization (“ISO”) standard; European firms, however, concerned about potential losses from a U.S.-focused technology requirement, dominated that process, resulting in an ISO standard “much closer to European preferences.”²⁸⁰

Agencies might also expect fewer hassles from political overseers, whether in Congress or the White House.²⁸¹ It is not controversial that regulated entities tend to be quite well represented in these settings.²⁸² Agency adoption of SDO standards may reduce regulated entity complaints to Congress or the White House because the rules incorporating private standards

276. Shapiro, *supra* note 126, at 405, 411.

277. *Id.* at 410–11 (discussing holdup problem).

278. Seidenfeld, *supra* note 231, at 464 (“[A]dministrators have a strong incentive to cooperate with entities directly subject to their regulatory decisions and other interest groups that regularly participate in the agency’s proceedings.”).

279. *E.g.*, Bremer, *supra* note 10, at 140 (“[R]egulated parties are often already complying [with private standards]. This reduces the discrepancy between industry practice and federal regulation”); Comment of R. Bruce Josten, Exec. Vice President of Gov’t Affairs, Chamber of Commerce of the U.S. 2 (OFR Docket Apr. 3, 2012) [hereinafter Comment of Chamber of Commerce], available at <http://www.regulations.gov/contentStreamer?objectId=0900006480feb794&disposition=attachment&contentType=pdf> (stating that incorporation of SDO standards “provides certainty and saves money for businesses, which are often either involved with the formation of the standard or already in compliance”).

280. Strauss, *supra* note 2, at 555 (internal quotation marks omitted).

281. *E.g.*, Bagley, *supra* note 269, at 5 (“[I]ndustry effectively leverages its influence with those elected officials responsible for overseeing the agency”).

282. Murphy, *supra* note 231, at 687 & n.33 (“A common criticism of OIRA review is that it is secretive and generally favors regulated interests.”).

are better for the public-interested reasons articulated in the legislative history to the NTTAA—less complexity and potential duplication, compared with the layering of government-unique standards over voluntary consensus standards.²⁸³ Or the standards might better reflect technology already in use, taking advantage of private sector knowledge. More ambiguously, the risk of political backlash might be reduced if SDO standards simply demand less of regulated entities or better track their preferred resource allocation. And once politically powerful industries become vested in a private standard-setting process, it may be more difficult for agencies to shift to government-unique standards.²⁸⁴ Further, while the OMB exercises significant oversight of agency rules through the Office of Information and Regulatory Affairs (“OIRA”), official OMB policy, as noted, already establishes a preference in favor of incorporating voluntary consensus standards. This suggests that the OMB too is interested in realizing the potential resource savings from adopting existing privately developed standards.²⁸⁵ The extent of OIRA review of IBR rules is unclear.

All this assumes that agencies can often have discretion to select among a range of regulatory standards that will satisfy statutory requirements, enabling them to select a substantive SDO standard significantly different from the standard the agency might have designed on its own. This assumption seems eminently realistic. Statutes typically grant agencies quite broad regulatory discretion.²⁸⁶ Further, agency decisions receive deferential judicial review.²⁸⁷ Indeed, Congress’s enactment of a statutory preference for voluntary consensus standards in the NTTAA implicitly recognizes that agencies generally possess a range of regulatory choices.

Thus, federal agencies have significant incentives to incorporate by reference private standards that are separate from and potentially in tension

283. See *supra* text accompanying notes 63–65 (discussing concerns underlying NTTAA). Agency regulatory standards are subject only to ad hoc congressional oversight and correction, oversight that is probably more likely to be triggered by well-organized, concentrated groups of regulated entities in any event. Seidenfeld, *supra* note 231, at 464 (“A regulated entity frequently is a large corporation with resources to appeal agency decisions at every level. . . . [R]egulated entities and special interest groups often contribute significantly to political campaigns.”). Congress may also find reduced agency budget demands appealing.

284. Shapiro, *supra* note 126, at 411 (discussing accounting industry example; private standards were not displaced by public ones until high-profile scandal).

285. See *supra* text accompanying notes 60–62 (regarding Circular No. A-119’s preferences for agency use of private standards). See generally Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010) (regarding significant modifications to rules made in OMB–OIRA review of agency rules).

286. Mendelson, *supra* note 285, at 1128.

287. Courts will overturn an agency rule only if it is arbitrary, capricious, or contrary to law, including required procedures. See 5 U.S.C. § 706 (2012). The arbitrary and capricious determination is obviously deferential, and under the *Chevron* and *Skidmore* doctrines, courts also defer to agency interpretations of their governing statutes. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). It is unclear whether an interpretation of a statute that an SDO initially developed and that an agency incorporated into a federal rule would be entitled to *Chevron* deference.

with statutory goals. This undermines the effectiveness of internal mechanisms of accountability. And there is no other institution whose approval must automatically be sought for the content of SDO standards and that might have a strong incentive to guard against poor-quality SDO rules.²⁸⁸

d. *External Accountability Mechanisms*

Thus, we cannot readily rely on agency approval or, absent meaningful public access, the rulemaking process to ensure that SDO-drafted standards do properly implement authorizing statutes and serve the public interest. What about external accountability mechanisms that concerned citizens and entities could invoke? Such accountability mechanisms may be particularly important for individual citizens, small entities, and regulatory beneficiaries in general, who are affected by these standards but who also tend to be underrepresented in the processes of both agencies and SDOs.²⁸⁹

For all the external accountability mechanisms, however, whether reasons are demanded and consequences visited on an agency through the electoral process, through congressional oversight or new legislation, through White House oversight, or through judicial review, transparency remains a necessary condition.²⁹⁰ And that transparency has to mean not just that incorporated SDO rules are not secret but also that their content is meaningfully available to the public.

So, for example, if individual consumers or groups, such as Consumers Union, wish to “push for stronger and more protective standards for consumers” under the Consumer Product Safety Act,²⁹¹ they must, in their own words, be able to have “easy and free access to relevant standards.”²⁹² Again, wherever we draw the line of “meaningful” public access, the imposition of significant access costs by SDOs puts IBR rules on the wrong side.

Consider electoral accountability. As noted, this accountability mechanism has intrinsic limitations because elections do not provide voters with infinite choices.²⁹³ Assume, however, that voters have a reasonable range of choices, say, in a presidential election, and that agency officials can be meaningfully, if indirectly, held accountable in such an election.²⁹⁴ The public must be well informed enough and its views on regulatory policy sufficiently

288. The OFR must approve incorporations by reference, but its approval authority does not extend to substantive grounds. See 5 U.S.C. § 552(a)(1).

289. See *supra* text accompanying notes 95–129, 231–234 (regarding SDOs and agencies). Underrepresentation, of course, is a potential problem in Congress and the White House as well. E.g., Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 209 (2012) (on the White House).

290. Clark, *supra* note 52, at 361–62 (first stage of accountability is through “informing”); Shkabatur, *supra* note 230.

291. E.g., Consumer Product Safety Act, 15 U.S.C. §§ 2051–84 (2012).

292. Comment of Consumers Union, *supra* note 198, at 2.

293. See *supra* text accompanying note 215.

294. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147, 3155–56 (2010).

developed so that regulatory policy decisions will be salient to an election. The president must further have an incentive to implement those views through agency supervision²⁹⁵ and through the appointment and removal of top agency officials. While people have expressed doubts about various aspects of this accountability mechanism,²⁹⁶ ordinary citizens cannot even begin to register their unhappiness with federal agency actions through the presidential election if they cannot easily learn the content of binding rules.

Easy access to the rules' content is also needed to effectuate other accountability mechanisms, such as congressional actions that more specifically direct agency action or congressional oversight of statutory implementation.²⁹⁷ Congressional oversight, while easier to obtain than new legislation, is at best an imperfect accountability mechanism, since it tends to be ad hoc, sometimes overly responsive to "well-organized interest groups," and may be conducted by unrepresentative submajorities.²⁹⁸ But to the extent that congressional review of agency rules can have any useful effect, obstacles to access by the public and by Congress to the rules' content will obviously impair a congressional committee's ability to perform any meaningful oversight function, including by demanding an agency official's explanation of a regulatory decision. For example, during the Gulf oil spill, a House of Representatives committee wishing to evaluate a federal pipeline safety standard that incorporated by reference a standard drafted by the

295. White House supervision of agency rulemaking through the OIRA process appears to result in significant numbers of changes to rules, although the content of these changes is generally difficult to discern. See Mendelson, *supra* note 285.

296. Political accountability has meant "vesting of ultimate decisional authority in a person who is elected." Wells, *supra* note 182, at 628 (quoting Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 196 (1994)). Scholars have expressed significant doubts regarding whether presidential elections can be meaningful devices for voters to hold agencies accountable for particular agency decisions. E.g., Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 459 (2010); Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 563–64 (2003); see also Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 383 (2010).

297. Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1821 (2012) ("[M]aking the administrative decisionmaking process more transparent [makes it] more amenable to congressional oversight."). Congressional oversight has been conceptualized as a representative mechanism of holding agencies accountable to the "popular will," and alternatively as a means of prompting public deliberation on an issue before an agency. See Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 9–10 (1994) ("[C]ongressional monitoring and after-the-fact restraints provide an important check on agency decision-making [despite] some shortcomings.").

298. Glen Staszewski, *The Federal Inaction Commission*, 59 EMORY L.J. 369, 420 (2009) ("[O]versight . . . ignores arbitrary decisionmaking by . . . agencies that escape[] the attention of well-organized interest groups."); see also Mendelson, *supra* note 215, at 1355 & n.57 (discussing the unrepresentative submajorities problem); Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 10 (1994) (noting that monitoring and reporting may reveal an agency's actions but might not necessarily prompt any change).

American Petroleum Institute was reportedly obstructed in its efforts when the API told staff that the IBR standard was available—for a price of \$1,195.²⁹⁹ Again, although the standard was not secret, the price demanded was a significant obstacle to access.

Similarly, to the extent that ordinary citizens, small entities, or outside groups wish to appeal to the OIRA, which reviews all significant agency rules pursuant to the Executive Order on Regulatory Planning and Review,³⁰⁰ they must have ready public access to the content of the rules.

Finally, ready public access is also important for any entity to hold an agency accountable in the courts through judicial review. Both regulated entities and regulatory beneficiaries with sufficiently concrete interests to satisfy standing requirements can generally invoke judicial review of regulatory standards under the APA.³⁰¹ In that review, courts can assess whether regulatory standards are arbitrary, capricious, or contrary to the agency's authorizing statute or any other law.³⁰²

Again, that these rules are not formally secret is beside the point. The obstacles to accessing the text of the rules undermine the effectiveness of all these accountability mechanisms. Both regulated entities and regulatory beneficiaries must be able to readily learn what the standards say.³⁰³ As the comments filed to the OFR suggest, the ordinary consumer, neighborhood resident, or even small business owner cannot afford \$60 for a single standard or hundreds of dollars for a membership fee to participate in developing standards or even simply to read them. Travel costs to Washington, D.C., are likely to be comparable to or greater than access fees for most people. Even without access fees, an affected or interested person would already have

299. Comment of David Halperin, Of Counsel, and Carl Malamud, President & Founder, Public.Resource.Org. 14 (OFR Docket Apr. 11, 2012) [hereinafter Comment of Public.Resource.Org], *available at* <http://www.regulations.gov/contentStreamer?objectId=0900006480feda5e&disposition=attachment&contentType=pdf>. Even though the API relented and agreed to supply the standard free of charge, Congress then enacted a provision in the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90, § 24, 125 Stat. 1904, 1919 (2012) (to be codified at 49 U.S.C. § 60102(p)), prohibiting pipeline safety guidelines or regulations from incorporating by reference any material that is not made available to the public free of charge. Comment of Public.Resource.Org, *supra*, at 14; *see also* Strauss, *supra* note 2, at 508 n.69.

300. Exec. Order 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

301. *See* 5 U.S.C. § 706 (2012); Mashaw, *supra* note 227, at 120 (describing a “legal public accountability regime” as one of three main devices for public governance accountability regimes).

302. 5 U.S.C. § 706.

303. *E.g.*, Shkabatur, *supra* note 230, at 84 (noting that transparency can be a “necessary, but insufficient, requirement for public accountability”); *see also* Mashaw, *supra* note 227, at 129 (discussing “transparent and regularized procedures which even outsiders can know and appeal to in seeking to trigger accountability processes”).

to spend significant time acquiring information about governmental standards and preparing comments or attempting to invoke other means of accountability.³⁰⁴ One consequence of these demands on potential participants is that business groups already disproportionately participate in the agency rulemaking process.³⁰⁵ That these standards are both difficult to locate and costly substantially undermines the usability of accountability mechanisms for ordinary people.

3. The Distinctive Burdens Imposed by Access Prices for IBR Rules

One could raise a number of objections. Perhaps individuals are not beating down the doors of SDOs to read these standards. Then greater public access would not increase accountability. Numerous public comments filed to the OFR in 2012 on incorporation by reference, however, came from concerned individuals and small businesses seeking to read the standards.³⁰⁶ Owing to the challenges of locating IBR material on websites and the cost of access, the number of individual requests SDOs have received for these standards and the number of challenges to the standards almost certainly understate the amount of public interest in reading them. Further, the OFR is proposing to eliminate regulatory restrictions, beyond reducing the volume of the Federal Register, on the sort of private standards an agency can incorporate by reference. This is likely to increase the number of rules of general public interest that are incorporated by reference.

Moreover, it could be said of any form of governmental disclosure to the public, including congressional statutes, that only a few people are interested in the details. Inevitably, individuals vary in the level of “personal importance they attach to their attitudes on public policy issues.”³⁰⁷ Professor Krosnick’s study of citizen attitudes on high-salience issues identifies the presence of so-called “issue publics.” Only “relatively small groups of citizens” may find a given issue to be of an “extremely high level[] of importance”; the rest may be comparatively disengaged.³⁰⁸ But as his study suggests, it is not that “most citizens are without many policy preferences”

304. See, e.g., Nina A. Mendelson, Response, *Should Mass Comments Count?*, 2 MICH. J. ENVTL. & ADMIN. L. 173, 177 (2012).

305. See, e.g., CORNELIUS M. KERWIN, RULEMAKING 188 (2d ed. 1999); Wagner, *Administrative Law*, *supra* note 231, at 1386; Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 133 (2006).

306. See, e.g., Comment of A Concerned Citizen, *supra* note 195; Comment of Penza Bailey Architects, *supra* note 78; Comment of Robert Tess, *supra* note 79.

307. Jon A. Krosnick, *Government Policy and Citizen Passion: A Study of Issue Publics in Contemporary America*, 12 POL. BEHAV. 59, 60 (1990), available at <http://www.stanford.edu/dept/communication/faculty/krosnick/docs/1990/1990%20government%20policy%20and%20citizen%20passion.pdf>.

308. *Id.* at 61.

but rather that interests vary within the population, and many small minorities may hold significant policy attitudes to which politicians respond.³⁰⁹ Thus, even if not every citizen may be concerned with a particular safety standard, meaningful public access allows these smaller groups to engage, increasing governmental accountability.

It would also be no answer to say that even with access fees, SDO rules remain accessible to a few—those who can afford them or who can travel to Washington, D.C. This is because the access limitations are not random; they systematically exclude people based on budgetary constraints. For many of these rules, budgetary constraints will likely be connected with the substantive interests under the rule. For example, consumers are generally likely to have smaller budgets than manufacturers. A financial barrier to accessing product safety standards thus is likely to distinctively and systematically disadvantage consumer interests. Neighbors to a pipeline are also likely to have smaller budgets than pipeline operators. Even if all relevant legal standards are free to the public, the pipeline operator would have an advantage, compared with neighbors and consumers, in participating in SDO and agency procedures, in obtaining expert and legal technical assistance to challenge standards, and in holding agencies accountable for the standards they select. But the access costs worsen this imbalance since they may keep many consumers and neighbors from even getting in the door.

One could also object that addressing SDO access fees is unnecessary since they hardly represent the only obstacle to an interested citizen's ability to understand the law or enforce her legal rights. Again, financial resources can indisputably matter to an individual's ability to effectuate her legal rights. In litigation, for example, representation by counsel can often affect the outcome.³¹⁰ Substantial numbers of individuals with legal issues ranging from child custody to potential deportation to foreclosure lack resources and access to low-cost legal services and are thus compelled to represent themselves, generally to their detriment.³¹¹ Relatedly, some have commented that incorporated standards tend to be "technical" and thus are not likely to be accessible without outside expertise.

We might further group these objections into two points. First, an individual may need resources to understand the contents of a (possibly technical) standard. That expertise may not come cheap. Second, an individual

309. See *id.* at 83. Krosnick found evidence to suggest that these strong interests are not necessarily only held by the highly educated. *Id.* at 77.

310. See, e.g., Editorial, *For Want of a Good Lawyer: Deportation Without Representation*, N.Y. TIMES, Dec. 25, 2011, at SR14, available at <http://www.nytimes.com/2011/12/25/opinion/sunday/deportation-without-representation.html> ("[In deportation cases,] [a]bout 67 percent of those with lawyers during the period reviewed were allowed to stay, while only 8 percent of those without counsel avoided deportation.").

311. *Id.*; Ethan Bronner, *Right to Lawyer Can Be Empty Promise for Poor*, N.Y. TIMES, Mar. 16, 2013, at A1, available at <http://www.nytimes.com/2013/03/16/us/16gideon.html?pagewanted=all>. But see *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 333–34 (1985) (noting, in nonadversarial veterans' benefits proceedings, "no . . . great disparity" between outcomes when claimants were represented by attorneys and other cases).

may need resources to invoke any useful mechanism making practical use of the contents, once she understands them. Thus, even if access to the contents of the law were free and widespread, an individual reading regulatory standards could still face significant financial obstacles to fully utilizing the information. Given each of these resource demands, perhaps we might view the access prices charged—whether \$50 or \$300—as inconsequential. Meanwhile, at the other end of the continuum, large corporations charged with compliance or even large nonprofits with significant resources might also find access costs trivial.

Concededly, the individual looking at “technical” standards might need expertise to understand the text, including legal or scientific expertise. Standards incorporating testing protocols for environmental performance properties of insulation for wire and cable,³¹² as with published federal rules on measuring lead in gasoline,³¹³ may simply state a technical professional consensus on testing approaches. Such standards may be inaccessible to even the college-educated, unless the reader possesses advanced training in chemistry or physics. To the extent that the reader lacks relevant knowledge, hiring an expert may be costly.

But some members of the public will have relevant expertise, as the comments filed to the OFR demonstrate. And as Krosnick’s work suggests, the strong interest of even a relatively small group of individuals may prompt policymakers to carefully consider their decisions. Certainly, we should put aside the argument that these standards are not of interest to the public at large.³¹⁴ So-called “technical” standards often function to define substantive policy, making them highly likely to be of broader interest even if standards that are truly definitional might be of less interest.³¹⁵ The ANSI standard on “[b]iometric data interchange formats,”³¹⁶ incorporated into federal requirements for driver’s licenses, may sound technical in the colloquial sense, but the type of biometric data the government collects has generally raised concerns with privacy advocates.³¹⁷ At \$199, however, its price

312. *E.g.*, 7 C.F.R. § 1755.390(a)(7) (2013) (incorporating ASTM D 4566-90, “Standard Test Methods for Electrical Performance Properties of Insulations and Jackets for Telecommunications Wire and Cable”).

313. *E.g.*, 40 C.F.R. pt. 80, app. B (2012) (covering methods for determining total lead content in gasoline, including dilution, stabilization, calibration, and calculation procedures).

314. *See* Bremer, *supra* note 10, at 147 n.65.

315. Even the NTTAA’s definition of “technical standards,” which does not in any way constrain agency incorporation of private material, stretches broadly to include standards with policy and values components: the standards are defined to mean “performance-based or design-specific technical specifications and related management systems practices.” National Technology Transfer and Advancement Act of 1995 § 12(d)(4), 15 U.S.C. § 272 note (2012) (Utilization of Consensus Technical Standards by Federal Agencies).

316. *eStandards Store: ISO/IEC 19794-5:2005*, AM. NAT’L STANDARDS INST., available for sale at <http://webstore.ansi.org/RecordDetail.aspx?sku=ISO%2fIEC+19794-5%3a2005> (last visited Nov. 13, 2013), incorporated by reference in 6 C.F.R. § 37.17(e)(1) (2013).

317. *See, e.g.*, SAMIR NANAVALI ET AL., BIOMETRICS (2002); Mark G. Milone, *Biometric Surveillance: Searching for Identity*, 57 BUS. LAW. 497 (2001); *see also* TIM BÜTHE AND WALTER

makes it accessible only to a few.³¹⁸ Moreover, many standards, such as OSHA's incorporation of ANSI safety standards for ladders, are expressly aimed at achieving policy goals.³¹⁹ Still more of the "technical" incorporated standards clearly have the effect of defining substantive policy, as with the use of private pharmaceutical compendia to define the extent of Medicare coverage for off-label uses of prescription drugs.³²⁰

Many such rules may not even be "technical" in the sense that they require advanced training or expertise to comprehend. Agencies incorporate plenty of material that is phrased in ordinary language. The API's standard for public awareness in the event of a pipeline spill is an obvious example, phrased (as it should be) in terms equally comprehensible to pipeline operators, first responders, and community members.³²¹ The ASTM standards for bicycle helmet safety, incorporated by reference into CPSC helmet safety standards, are also accessible; they provide, for example, that helmets are to be "dropped onto [a] flat anvil from a theoretical drop height of 2 m."³²² Nor do agencies appear particularly limited in their ability to incorporate nontechnical standards, as noted. In fact, Circular No. A-119 encourages agencies to adopt voluntary standards in large part because they may represent a "consensus."³²³

In short, many of these standards are substantive and may not even be technical in the colloquial sense. Further, the OFR, as noted, is expressly proposing to expand the use of IBR standards to address nontechnical matters by eliminating the current regulatory requirement that an IBR rule consist of "data, criteria, standards, specifications, techniques, illustrations, or similar material."³²⁴ This requirement has been commonly understood to mean that IBR standards must be "technical," although the term "standards" clearly sweeps more broadly. For example, using current rules, the OFR has

MATTLI, *THE NEW GLOBAL RULERS* 224 (2011) (noting that consumers are outsiders in global standards discussions).

318. See *eStandards Store: ISO/IEC 19794-5:2005*, *supra* note 316.

319. See 29 C.F.R. § 1915.72(a)(6) (2013) ("Manufactured portable wood ladders provided by the employer shall be in accordance with the provisions of ANSI Standard A14.1-1975 . . ."). This standard does not appear to be available on the ANSI website in any event, having apparently been superseded by a 2007 version that seeks to ensure "safety under normal conditions of usage." *eStandards Store: ANSI ASC A14.1-2007*, AM. NAT'L STANDARDS INST., <http://webstore.ansi.org/RecordDetail.aspx?sku=ANSI+ASC+A14.1-2007#.UTptMlc2G1g> (last visited Sept. 29, 2013).

320. See *supra* note 24 and accompanying text.

321. See *supra* notes 22, 30 and accompanying text.

322. See ASTM INT'L, ASTM F1447-93: PROTECTIVE HEADGEAR USED IN BICYCLING § 4.2 (1993), available at <http://www.astm.org/READINGLIBRARY/VIEW/F1447-93.html> (incorporated by reference into 16 C.F.R. § 1203.53(a)(2) (2013)).

323. CIRCULAR NO. A-119, *supra* note 60, para. 3 (defining "standard" expressly to include "processes and production methods, and related management systems practices . . . specification of dimensions, materials, performance, designs or operations" and expressly excluding only "standards of personal conduct" and "[i]nstitutional codes of ethics").

324. See 1 C.F.R. § 51.7(a)(2) (2013) (current law); Incorporation by Reference, 78 Fed. Reg. 60,784, 60,797 (revision to same, proposed Oct. 2, 2013).

approved incorporation of public awareness requirements for pipeline operation. And finally, the evidence to date confirms that individual citizens are interested in reading current standards, undeterred by their purportedly technical quality.³²⁵

The second objection is that, given other financial obstacles (such as attorney's fees) associated with invoking legal rights, access costs are again unlikely to be consequential. This objection would appear to have the most force if a reader of the standard were to affirmatively seek judicial review challenging an incorporated rule.³²⁶ There, expensive attorney representation, while not formally required, is likely to be useful. But individuals do proceed *pro se* or with low-cost or *pro bono* counsel. As one comment filed by Vermont Legal Services indicates, when an affected individual proceeds in this manner, access costs to the relevant standards can prove to be an insuperable barrier.³²⁷

In addition, affirmative litigation or claim filing is only one of several actions that a reader of an IBR standard might wish to take. As to the others, access costs alone are likely a significant barrier. First, people may simply wish to know what they need to do to comply with the law. The complaint from truckers, for example, is not that they cannot understand the applicable incorporated standards; it is that they must pay to access them.³²⁸ Related complaints have been made on behalf of smaller companies that manufacture airplane parts.³²⁹ Even if regulated individuals or entities might have a due process defense to an enforcement action because the standards were not affordable, defending against an enforcement action itself likely requires costly legal services, putting a premium on compliance.

For consumers and beneficiaries of entitlements who want to make more informed decisions on which products to buy, which communities to live in, or which medical services to select to ensure Medicare coverage, access, rather than expertise, again is the key issue. Both the cost of access and the difficulty of locating standards can represent distinctive obstacles.

Finally, individuals have other tools besides litigation for holding the government accountable. Ordinary individuals can and do readily write to members of Congress regarding agency action or file comments directly with agencies. Individuals file many thousands of comments on proposed

325. See *supra* note 306 and accompanying text.

326. Some statutes also authorize citizen suits to enforce rules—as to these, again, attorney assistance is likely to be valuable. *E.g.*, 33 U.S.C. § 1365 (2006) (authorizing citizens to commence a civil action against any person alleging violation of an effluent standard or limitation under the Clean Water Act).

327. See Comment of Vermont Legal Aid, *supra* note 34.

328. See *supra* text accompanying note 81.

329. See Comment of the Modification & Replacement Parts Ass'n, *supra* note 19, at 4 (“The burden of paying high costs simply to know the requirements of regulations may have the effect of driving small businesses and competitors out of the market, or worse endanger the safety of the flying public by making adherence to regulations more difficult due to fees . . .”).

federal agency rules through <http://www.regulations.gov> every year.³³⁰ Again, the critical issue here is access. Thus, the charging of access costs represents a distinctive—not simply an incremental—impediment to public participation in agency decisionmaking and to registering views with Congress.

4. Expressive Harm Imposed by Access Fees

Having to pay a fee to read the law can obstruct individuals from learning their obligations, making informed decisions, or seeking governmental accountability. But even if the incremental costs of access are relatively minimal in some settings, the government's decision to regulate by incorporating expensive, difficult-to-locate standards also sends a damaging message to the public.

We have a long and constitutive history of free and widespread public access to federal laws.³³¹ Indeed, it might be likened to our history of upholding free access to elections.³³² In that setting, the Supreme Court has invalidated poll taxes that might seem trivial compared with the costs of traveling to the polls or taking time off work to vote. The Court has stated that “[w]ealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process.”³³³

Similarly, incorporating standards into law that are generally available only after paying a significant fee set by a private entity or traveling to Washington, D.C., contrasts starkly with the strong American tradition of making statutes and regulations freely and widely available. The depository library system and, more recently, the internet have consistently provided that free access.³³⁴ There are approximately 1,200 depository libraries nationwide.³³⁵

By contrast, IBR rules are not only costly for citizens to access but also more difficult to locate than other binding law, since outside the OFR’s Washington, D.C., reading room, numerous SDOs control access to the thousands of incorporated standards. Moreover, as Professor Coglianese has written, citizens now use “websites as their primary point of contact with

330. See generally Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943 (2006) (discussing rulemaking participation trends); Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123, 126–29 (2012) (same).

331. E.g., Comment of Cary Coglianese, Edward B. Shils Professor of Law, Univ. of Penn. Law Sch. 1 (OFR Docket May 30, 2012), available at <http://www.regulations.gov/contentStreamer?objectId=0900006481022904&disposition=attachment&contentType=pdf> (“The ability of members of the public to read and understand the rules imposed by their government has long been a hallmark of democracy. Accordingly, both Congress and every President over the last twenty years have adopted laws, policies, or initiatives directing agencies to make regulatory and other information more readily available to the public on the internet.”).

332. U.S. CONST. amend. XXIV, § 2.

333. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666–68 (1966) (invalidating a state \$1.50 poll tax as violating equal protection and as effective denial of the right to vote).

334. See *supra* text accompanying notes 159–180.

335. See *FLDP for Public*, U.S. GOV’T PRINTING OFFICE, <http://www.gpo.gov/libraries/public> (last visited Nov. 13, 2013); see also NAT’L ACAD. OF PUB. ADMIN., *supra* note 172.

their government, [so] even seemingly small and subtle barriers that inhibit fair public access to government information take on significance.”³³⁶ If anything, the significance of sharply reduced access to SDO standards has been heightened by recent presidential statements increasing the government’s stated commitment to transparency, including acknowledgments that “[o]penness will strengthen our democracy,” and, as noted, that “transparency promotes accountability.”³³⁷

The use of IBR rules sends citizens a set of messages that are profoundly inconsistent not only with our other practices and with presidential statements but also with core assumptions of a democratic government. The obstacles, including the expense, of accessing IBR standards are “hostile in [their] essence” to the notion that a democratic government must govern publicly.³³⁸ Most obviously, for citizens to participate in the electoral process and in public discussion on political matters, they must be able to readily learn what the government is doing. IBR rules are not secret. But by making access expensive, difficult, or both for ordinary citizens, agencies are sending the message that the democratic process is beside the point for this set of quasi-legislative rules. Instead, the message is that the government mainly needs to be accountable to individuals and businesses of means.³³⁹

Moreover, when private organizations largely control access to the law, including the apparent power to curtail access to the text, this category of law, unlike federal statutes, other federal regulations, and federal court opinions, does not appear to be under public control.³⁴⁰ This, in turn, may prompt broader concern that agency policies are not necessarily chosen to serve the public interest. This cluster of messages is likely to feed public cynicism regarding governmental functions and the meaningfulness of voting and public participation, reducing civic engagement and the perceived legitimacy of government.³⁴¹

336. See Comment of Cary Coglianese, *supra* note 331, at 1–2.

337. Memorandum on Transparency and Open Government, *supra* note 185, at 1.

338. Cf. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1554 (2000) (quoting Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1113 (1986)) (internal quotation marks omitted).

339. Cf. Adam Liptak, *Seeking Justice? Try the Courtroom, Not the Line Outside*, N.Y. TIMES, Apr. 16, 2013, at A13, available at <http://www.nytimes.com/2013/04/16/us/supreme-court-spectator-line-acts-as-a-toll-booth.html> (quoting Harvard professor Michael Sandel that permitting line-standing companies to sell seats in the Supreme Court “is yet another instance of letting money dominate democracy . . . at odds with equal access”).

340. This situation differs significantly from legal research services such as those provided by Westlaw and Lexis. While these search and indexing services are surely valuable, the content of legal statutes, regulations, and court opinions remains readily accessible online for free. E.g., *Electronic Public Access Fee Schedule*, *supra* note 8 (“No fee is charged for access to judicial opinions.”).

341. See, e.g., Comment of Laura Breyers 1 (OFR Docket Mar. 21, 2012), available at <http://www.regulations.gov/contentStreamer?objectId=0900006480fdc436&disposition=attachment&contentType=pdf> (“There’s parts of the law that are owned by private corporations? Really? Well, if that’s ok with you, then let’s just go ahead and privatize the court system . . .”).

The presence of this expressive harm ought to matter in the institutions considering reform of agency use of IBR rules, whether in the OFR, the OMB, or Congress. Some have similarly argued that charging access fees for the court filings collected by “Public Access to Court Electronic Records” (“PACER”), the federal courts’ information system, have interfered in important ways with citizen access to the way the government operates, although PACER does not charge for judicial opinions.³⁴²

Expressive harm may also matter for constitutional arguments around incorporation by reference practices. As Professors Anderson and Pildes argue in the voting rights setting, courts have invalidated so-called “racial redistricting” not because the new districts actually dilute voting power but instead because “certain districts convey the message that political identity is, or should be, predominantly racial.”³⁴³

In the IBR setting, one could argue, for example, that even if only some citizens are effectively prevented from reading IBR standards, agencies are expressing a view that is fundamentally inconsistent with the First Amendment’s core value of free discussion of governmental affairs.³⁴⁴ This value in turn underlies the “right of the people to choose” governmental officials, directly or indirectly, in the electoral process.³⁴⁵ Indeed, these barriers to accessing IBR rules raise First Amendment issues.³⁴⁶

In fact why do we need the government at all, wal-mart seems to be really efficient at what they do, lets [sic] have them run things.”); *cf.* Farina et al., *supra* note 330, at 150–51 (noting the “value of individual and group participation in public policymaking processes” and commenting that encouraging participation that agencies will not value is “peddling democratic snake oil”).

342. *E.g.*, John Schwartz, *An Effort to Upgrade a Court Archive System to Free and Easy*, N.Y. TIMES, Feb. 13, 2009, at A16, available at <http://www.nytimes.com/2009/02/13/us/13records.html>. As noted, however, PACER imposes no charge for accessing the most important documents issued by the judicial branch—opinions that decide the cases.

343. Anderson & Pildes, *supra* note 338, at 1539; *see also id.* at 1543 (noting that Supreme Court decisions after *Brown v. Board of Education* held segregation unconstitutional without examining specific cultural or psychological effects).

344. Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) (“[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values.”) (quoting Connick v. Myers, 461 U.S. 138, 145 (1983)).

345. *See* United States v. Classic, 313 U.S. 299, 314 (1941) (“The right of the people to choose . . . is a right established and guaranteed by the Constitution . . .”).

346. At some point, the payment restrictions that the OFR has permitted for incorporated material may affect First Amendment values, since the public cannot become informed of or criticize government actions if the public does not know—or cannot readily learn—what they are. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982) (“[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.” (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966))); Leigh v. Salazar, 677 F.3d 892 (9th Cir. 2012) (“[A] court cannot rubber-stamp an access restriction simply because the government says it is necessary. By reporting about the government, the media are ‘surrogates for the public.’”) (requiring consideration of public right of access to view Bureau of Land Management horse roundups); *cf.* Harper v. Va. Bd. of Elections, 383 U.S. 663, 666–68 (1966) (invalidating state \$1.50 poll tax as effective denial of right to vote); Gitto v. Worcester Telegram & Gazette Corp. (*In re Gitto Global Corp.*), 422 F.3d 1, 6 (1st Cir. 2005) (holding that only the

By using IBR rules, one could also understand the government as communicating a message that is inconsistent with notions of equal protection and equal access to the government. Similarly, standing as a candidate can obviously require significant resources, whether it is the cost of broadcast advertising or the resources to take time off to campaign. A filing fee of a few hundred dollars thus might appear trivial by comparison, but courts have nonetheless consistently invalidated these fees as violating equal protection, given “our tradition . . . of hospitality toward all candidates without regard to their economic status.”³⁴⁷ By the same token, agency incorporation of private standards that the ordinary citizen can only access with significant cost, difficulty, or both is inconsistent with the idea that every citizen should have ready access to the law, whatever her economic status.

5. Loss of Benefits for Regulatory Development

Lastly, the free availability of laws and regulations generally benefits the ongoing development of regulatory standards. Future law drafters, whether in Congress, agencies, or private organizations, can learn from the innovations of earlier standards and their successes or failures. Innovations in regulatory design have led to a preference for performance standards over design standards, as well as an increased use of information-disclosure standards and so-called “nudging” standards that take advantage of behaviorist insights.³⁴⁸ Greater public disclosure of SDO-developed standards would undoubtedly increase the opportunity for these sorts of innovations.³⁴⁹

most compelling reasons can justify nondisclosure of judicial records). An agency interpretation that runs close to a constitutional line must be clearly authorized by Congress. *E.g.*, *Solid Waste Agency v. U.S. Army Corps. of Eng'rs*, 531 U.S. 159, 172 (2001) (“Where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.”).

347. *E.g.*, *Lubin v. Panish*, 415 U.S. 710, 717–18 (1974) (striking down as violative of equal protection a \$701 filing fee requirement for California county supervisor election); *see also Harper*, 383 U.S. at 666 (“[A] State violates the Equal Protection Clause . . . whenever it makes the affluence of the voter or payment of any fee an electoral standard.”).

348. *E.g.*, Michael S. Barr, *The Financial Crisis and the Path of Reform*, 29 *YALE J. ON REG.* 91, 108 n.114 (noting use, in the Dodd–Frank Act, of mechanisms to assess consumer responses to particular sorts of disclosure); Michael S. Barr, *An Inclusive, Progressive National Savings and Financial Services Policy*, 1 *HARV. L. & POL’Y REV.* 161, 174 (2007) (noting that “behavioral economics suggests that consumers will underestimate how much they will borrow and overestimate their ability to pay their bills in a timely manner,” a characteristic exploited by credit card companies). *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* (2008) (suggesting that behavioral research insights can usefully inform regulatory choices); William F. Pederson, *Regulation and Information Disclosure: Parallel Universes and Beyond*, 25 *HARV. ENVTL. L. REV.* 151 (2001).

349. *See also* Cunningham, *supra* note 45, at 311–12 (noting copyright’s concern with “incremental improvement through derivative works”; “[a]ll standards embodied in law would be subject to improvement through free rights to derivative creation”).

Technical standards that are open to the public can prompt technological innovation as well.³⁵⁰

In February 2013, similar considerations led the White House Office of Science and Technology Policy to announce a policy of making federally funded research freely available to the public within twelve months of its publication, even though this would have the effect of reducing revenues to the private publishers of that research. Although this research was not secret, the White House policy change recognized that the publication charges represented a significant obstacle to public access. Metadata was to be available without charge upon first publication. As the Office of Science and Technology Policy commented, the results of such scientific research “become the grist for new insights.”³⁵¹

III. PERMISSIBLE REFORM MEASURES

What should be done about IBR standards? Given a fuller understanding of the reasons why law must be readily available to the public, reform of IBR standards is clearly required. The fees that SDOs charge block ready public access and disproportionately affect those of more limited means, particularly individuals and small businesses. Affected individuals receive less notice of and benefit from the laws. The access limitations also affect the ability of these individuals to participate in the process of regulatory development and to hold agencies or SDOs accountable for the content of the standards. Again, these obstacles to access are not random, instead disadvantaging the less wealthy. And although persons seeking to understand or enforce their legal rights may, as a practical matter, also bear other costs, an agency’s decision to incorporate difficult-to-locate, expensive standards sends a message that is sharply inconsistent with our democratic commitments.

A more complete analysis of the public access question strengthens the case for reform of the IBR system. It further suggests that not all the reform options considered so far, whether legislatively or administratively, should be on the table.³⁵² Any further legislative or administrative action on agency use of incorporated private standards should ensure permanent, widespread public availability of those standards. At a minimum, full access is needed to

350. See Comment of Daniel Trebbien 1–2 (OFR Docket May 29, 2012), *available at* <http://www.regulations.gov/contentStreamer?objectId=090000648101ebc6&disposition=attachment&contentType=pdf>.

351. See Memorandum from John P. Holdren, Dir., Exec. Office of the President, Office of Sci. & Tech. Policy, to the Heads of Executive Departments and Agencies, Increasing Access to the Results of Federally Funded Scientific Research 1 (Feb. 22, 2013), *available at* http://www.whitehouse.gov/sites/default/files/microsites/ostp/ostp_public_access_memo_2013.pdf.

352. As noted, legislative reform may be possible, as in the limited context of pipeline safety, and the OFR is, at the time of writing, conducting a rulemaking on IBR. See *supra* text accompanying notes 41–44.

ensure that all interested parties, including both regulated entities and regulatory beneficiaries, have appropriate notice of their legal liabilities and entitlements. And any reform should provide citizens with assured ready access during the entire period the SDO rule has been incorporated into federal regulatory law.³⁵³ That access ought to be provided in a centralized location that is easy for individuals to find. Such centralized access must be freely available through governmental depository libraries. Library access to hard copies could also be provided, although it seems likely that most members of the public now rely on digital access.³⁵⁴ Ideally, reform would provide access to IBR rules through text or direct links on the Government Printing Office and Federal Register websites, and additionally through federal agency websites.³⁵⁵ Access should be through federally controlled websites to address a second critical barrier to public access—the current difficulty of locating IBR standards distributed over many different SDO websites.³⁵⁶

Full digital access without charge, beyond what is available at governmental depository libraries, would place access to IBR standards on the same footing as other federal regulations. (This sort of access would not necessarily preclude SDOs from selling books of standards, much as the Government Printing Office continues to sell bound reference sets of the CFR.) The current read-only access to these standards occasionally provided at the option of SDOs and on SDO websites is insufficient. The SDOs typically claim the right to revoke this access at will, and no enforceable commitments assure ongoing access.³⁵⁷

Nor is the OFR's proposed rule adequate. It would not speak directly to the level of public access required before language can be incorporated by reference into federal agency rules without Federal Register publication. Instead, the OFR is suggesting that a federal agency proposing or finalizing a rule with IBR material "[d]iscuss" the way the agency "worked to make the materials . . . reasonably available to interested parties."³⁵⁸ Because the rule contemplates OFR approval of agency use of an IBR rule that is not, in fact, "reasonably available," as long as the agency discusses its efforts, it is insufficient to address the public access question.

353. See *supra* text accompanying notes 139–142.

354. Comment of ABA Admin. Law Section, *supra* note 39, at 11.

355. Bremer notes that some agencies do occasionally insist on this sort of access. Bremer, *supra* note 10, at 179 & n.229.

356. For example, as discussed above, despite repeated efforts, I was unable to locate an advertised free-access version of an ASTM standard that the CPSC was proposing to incorporate during the writing of this Article. See *supra* note 73.

357. See *supra* note 30 and accompanying text. As noted, a reader seeking to access standards on a read-only basis on the websites where SDOs do provide them must often click on a release both waiving any challenges to SDO copyright as well as acknowledging the SDOs' full discretion to eliminate the provided access.

358. Incorporation by Reference, 78 Fed. Reg. 60,784, 60,797 (revision to 1 C.F.R. § 51.5(a)(1), proposed Oct. 2, 2013). In addition, as discussed above, the proposed rule would expressly broaden potential uses of IBR rules to include any rule that "[s]ubstantially reduces" Federal Register volume. *Id.* (proposing revision to 1 C.F.R. § 51.7(a)(2)(ii)).

Professor Cunningham suggests that an agency might have a number of options to procure public access to private standards the agency has incorporated by reference, other than permitting the SDO to set access charges.³⁵⁹ For example, an agency could negotiate a license with an SDO to make IBR standards readily available to the public through a link on the Federal Register or CFR website. Although SDO standards clearly supply value in the regulatory process,³⁶⁰ agencies should not need to pay “list price” to obtain this type of ready public access to incorporated standards. The prices SDOs currently charge for IBR standards are not “platonic” in any sense or even a function of the cost of production. Federal agency incorporation by reference of an SDO standard unquestionably increases the demand for it and, in turn, the likely income an SDO will receive.³⁶¹ For example, no-longer-current versions of SDO standards are sometimes priced higher than current versions simply because a federal agency has elected to incorporate the older one by reference.³⁶² (The presence or absence of a valid SDO copyright in incorporated standards may also affect the extent to which SDOs can charge the public for access.)³⁶³ And SDOs are benefited in other ways by federal incorporation of their standards, which may prompt them to make those standards available at a lower price. Incorporation by reference may represent a form of “free advertising” for the publisher, for example.³⁶⁴ Even for SDOs that identify as groups of experts, rather than industries, federal incorporation by reference of an SDO standard is a point of pride for the group.³⁶⁵ Particularly in groups where regulated entities are well represented, the strong interest in influencing the content of the law may even motivate an SDO to agree to read-only public access without further charge.³⁶⁶ As

359. *E.g.*, Cunningham, *supra* note 45, at 338–41 (discussing compulsory licensing, agency insistence on SDO provision of access, and other strategies).

360. SDOs have suggested that access charges represent compensation for the value SDOs create in drafting standards. *See, e.g.*, Comment of Am. Soc’y of Civil Eng’rs 1 (OFR Docket June 4, 2012), available at <http://www.regulations.gov/contentStreamer?objectId=090000648102e32a&disposition=attachment&contentType=pdf> (arguing that the phrase “reasonably available” must balance public access interests with “the right of organizations . . . to administer access to their intellectual property”).

361. *See, e.g.*, *supra* notes 70–73 and accompanying text (SDOs thus receive substantial price-setting ability). As others have argued, this amounts to a sort of monopoly rent. *See* Cunningham, *supra* note 45, at 335; Strauss, *supra* note 2, at 548 (noting that for older standards, the value to the SDO is simply from “the standard’s transformation into law”). As the nonprofit Public.Resource.Org has urged, this system has resulted in SDO CEOs earning extraordinarily high salaries. Comment of Public.Resource.Org, *supra* note 299, at 15.

362. *E.g.*, Strauss, *supra* note 2, at 509–10 (citing an example of American Herbal Products Association’s *Herbs of Commerce*; the 1992 edition, incorporated by reference in FDA rules, sells for \$250; the updated 2000 edition is available for \$99.99).

363. *See supra* notes 45–46 and accompanying text.

364. Comment of the Modification & Replacement Parts Ass’n, *supra* note 19, at 13.

365. Strauss, *supra* note 2, at 514 (“If the standard has been designed to become law, the claim of the public to know it is strong, and the SDO is more likely to be disappointed if its work is not converted into legal obligations than surprised if it is.”); *id.* at 515 (“Incorporation would also confer satisfying prestige on the SDO . . . adding to the value of its other works.”).

366. *See* Comment of Chamber of Commerce, *supra* note 279, at 1.

Cunningham writes, “Most organizations whose standards are embodied in law seek [incorporation into federal rules] and should eagerly cooperate.”³⁶⁷ The fact that several SDOs have elected to make IBR standards available on a read-only basis on their own websites following the petition to the OFR supports the conclusion that agency negotiation of a price for incorporated standards may not be tremendously difficult or expensive.³⁶⁸

In the case of an SDO that regularly supplies governmental standards, such as the NAESB or the API, governmental contracting may also be an option. Besides resolving in favor of the government the question of who owns the copyright to material that ends up in federal rules,³⁶⁹ contracting would have the salutary effect of permitting the agency to solicit bids to supply standards, thus increasing competition among groups to do so and enabling the agency to specify more open and accessible processes for standards development.³⁷⁰

For an SDO who is unwilling to sign such a contract or to negotiate to provide public access as a condition of incorporation, a federal agency intent on incorporating a publicly accessible standard would face a choice between drafting a government-unique standard or using compulsory licensing provisions (assuming the agency concludes that the SDO is asserting a valid copyright claim), as Cunningham discusses.³⁷¹ A federal agency could also “take” the SDO standard and pay compensation that is established through an adjudication process.³⁷²

What should be out of bounds? Any proposal that continues to rely primarily on SDOs for public access, so that the SDOs can condition such access on the payment of fees.³⁷³ Further, any reform must consider the needs not only of regulated entities, including small businesses, but also regulatory beneficiaries, which can encompass large segments of the public at large. Reforms must assure that groups currently underrepresented in agency and SDO processes have access to the text of these rules—and thus have a chance at participating in standards development and at invoking mechanisms of accountability. Nor would it be sufficient to provide free access only to limited groups. As one SDO stated in comments filed with the OFR, “[T]he sphere of persons affected by an IBR standard can be very large and at times difficult to accurately determine,” weighing in favor of a

367. Cunningham, *supra* note 45, at 342.

368. See *supra* text accompanying note 39 (describing petition). As of November 2013, the API appears to have agreed to make free read-only access to at least one standard directly from the Department of Transportation website. See U.S. DEP’T OF TRANSP., *supra* note 22.

369. See Rights in Data—General, 48 C.F.R. § 52.227-14(b) (2012) (providing as default rule that government has unlimited rights in data produced in performance of or delivered under a contract).

370. See also Strauss, *supra* note 2, at 544–45 (discussing “outsourcing”).

371. See Cunningham, *supra* note 45, at 332 (discussing compulsory licensing arrangements).

372. See Strauss, *supra* note 2, at 546–47 (discussing “takings” claims and noting that even a takings rationale would not typically justify allowing prior owners to charge the public).

373. See, e.g., Bremer, *supra* note 10, at 180–82.

straightforward approach that provides free online access to the entire public.³⁷⁴

While a small fee of, say, a couple of dollars, perhaps used to defray web-hosting costs, might not prevent most individuals or small businesses from reading standards, even a small fee could still represent a significant financial obstacle to those in poverty or those who wished or needed to access multiple standards. Moreover, an access charge, particularly if individuals were also compelled to resort to SDO websites to locate the standards, would still communicate a message of hostility to core democratic values. Thus, these standards ought to be made available to the public in the same manner as other federal regulatory standards—for free in governmental depository libraries and, ideally, through the Government Printing Office and agency websites as well.

Finally, a note on so-called “safe harbor” standards. At least one scholar, Professor Strauss, suggests that although IBR standards ought generally to be made public, agencies might use SDO standards as an illustrative means of compliance with more general federal regulatory requirements, so that compliance with the SDO standard would serve as one means of satisfying the federal requirement.³⁷⁵ This approach would be in lieu of mandating the content of the SDO standards.³⁷⁶ SDOs could, in turn, defray their revenue losses for some standards by continuing to charge for these “safe harbor” standards.³⁷⁷

An analysis that takes full account of the needs of regulatory beneficiaries for notice and for accountability, however, should make clear that such “safe harbor” standards should be just as available to the public as any other incorporated standard. Regulated entities may have a choice whether to follow such standards. Because the standards bind agencies to consider compliance with the standards as compliance with the law, however, the standards effectively define the federal protections provided to regulatory beneficiaries. For example, the CPSC’s bicycle helmet safety regulations provide that a helmet manufacturer’s compliance with any one of eight privately written standards will be deemed compliance with federal requirements.³⁷⁸ The manufacturer’s choice of compliance standard would define the extent of public protection. Moreover, a safe harbor may come to “dominate other means of compliance” because of the ease of proving that

374. Comment of Ronald E. Jarnagin, President, ASHRAE 4 (OFR Docket Mar. 30, 2012), *available at* <http://www.regulations.gov/contentStreamer?objectId=0900006480fe4f56&disposition=attachment&contentType=pdf> (providing comments from building standards development organization).

375. Strauss, *supra* note 2, at 549.

376. *Id.*

377. *Id.* at 551.

378. 16 C.F.R. § 1203.53(a) (2013).

the standard has been satisfied.³⁷⁹ Because regulated entities and beneficiaries both need notice of the standard and an opportunity to hold government and SDOs accountable for it, “safe harbor” standards should be subject to the same public access requirements as any other binding rule.

CONCLUSION: ON PUBLIC ACCESS

With the increasing reliance on IBR standards in federal rules, we are in the process of creating a situation very similar to the one that Professor Griswold complained about in 1934 and that prompted Congress to enact the Federal Register Act.³⁸⁰ Regulations that impact “persons and property” are published ad hoc in numerous locations and are hard to locate, even when federal agencies provide SDO contact information in the CFR. And of even greater concern, our access to these standards is primarily through private organizations empowered to charge significant fees. Indeed, current access might be compared unfavorably to the accessibility of edicts at the time of Caligula. Then, a citizen could use a ladder and a magnifying device. With IBR rules, moreover, the public’s access is not randomly impaired but is instead impaired disproportionately based on income. Those with smaller budgets, such as consumers, employees in hazardous workplaces, or small businesses, are obviously and disproportionately affected.

So, why does the law need to be public? And what should “transparency” mean in the setting of binding law? Assessing interests around IBR standards yields a clearer sense of what underlies the deeply felt intuition that law needs to be public. What is clear is that it is generally an insufficient answer to say, as the OFR has recently stated with respect to IBR rules, “[T]he government is not prohibiting access to the materials.”³⁸¹

Public access to governmental decisions and governmental information is not an on–off switch. At one end of the continuum, we might consider genuinely “secret” documents, with security classifications, for which unauthorized public disclosure is prohibited and penalized. At the other, we might consider documents that agencies affirmatively distribute online and post in public places, specifically phrase in “plain language,” and even translate into other languages. Transportation Security Administration brochures and airport signs concerning traveling with liquids might be an example. Such governmental statements not only provide information widely but seek

379. *Comment of ABA Admin. Law Section*, *supra* note 39, at 10; TIM BÜTHE AND WALTER MATTLI, *THE NEW GLOBAL RULERS* 17 (2011) (with respect to “voluntary” European standards, “the effect of standards is direct and binding since the cost and difficulty of proving equivalence are enormous”). 29 C.F.R. § 1910.135(b)(2) well illustrates this point. It provides that “[h]ead protection devices that the employer demonstrates are at least as effective as head protection devices that are constructed in accordance with one of the above consensus standards will be deemed to be in compliance. . . .” An employer wishing to use this option must measure its performance against that of the private standard, an approach itself requiring recourse to the private standard.

380. *See supra* text accompanying notes 5–7, 166–167 (discussing Griswold’s arguments).

381. Incorporation by Reference, 78 Fed. Reg. 60,784, 60,787 (proposed Oct. 2, 2013).

to minimize any obstacles to public comprehension of governmental actions and requirements.³⁸²

For regulatory standards, one must assess the level of needed public access with reference to the demands of public notice and governmental accountability. In the modern age, notice needs to be broadly understood. Access must be widely available to those who must conform their conduct. And access must also be generally available to the intended beneficiaries of legislation, such as consumer protection or environmental quality laws. Individuals' financial and personal interests may be impacted and their decisions affected by the presence or absence of a governmental decision, even if they are not directly subject to sanctions. Thus, that a law is not formally secret is not sufficient for notice purposes. If those burdened with obligations cannot learn their substance without paying hundreds of dollars to an SDO or traveling to Washington, D.C., the law is not meaningfully public. The same sorts of burdens deny meaningful access to beneficiaries of the law.

And to ensure accountability, we need at least as much—usually greater—public access to quasi-legislative actions as to more narrowly focused decisions, where more process may be available. Legislative and quasi-legislative actions are among the core actions of modern government, elections are critical for accountability, and a citizen's ability to cast an informed vote in a democracy depends on meaningful public access.

In the modern administrative state, partly in response to limited electoral accountability, we have devised a range of accountability mechanisms to ensure that an agency's action is not an abuse of its authority, is consistent with the law, and is properly democratically responsive. The need for public access to rules, and to IBR rules specifically, has to be assessed in the context of these evolving mechanisms of accountability. For agency rules in general, public access must be sufficient to support a person's ability to participate in and seek revision of agency decisions and to demand that agencies account for their actions through that process, through judicial review, and through White House and congressional oversight. Thus, meaningful public access to rules must denote widespread and free—or extremely low-cost—access. At a minimum, this means the sort of free access currently provided over the internet and at public and depository libraries.

And as administrative agencies and Congress increasingly experiment with so-called “collaborative governance,” we must continue to actively consider public access needs. In particular, we must consider what level of access will ensure public accountability when, as with IBR rules, governmental institutions rely on the work of private ones. In such collaborative governance efforts, the government must be accountable for ensuring that all the participants have committed to public goals and that democratic norms are not

382. E.g., TRANSP. SEC. ADMIN., 3-1-1 FOR CARRY-ONS: PREPARE FOR TAKE-OFF (n.d.), available at http://www.tsa.gov/sites/default/files/assets/pdf/311_brochure.pdf.

“erode[d]”—as Freeman terms this aim, the “publicization” of the process, including for participating private institutions.³⁸³

In particular, we must focus in detail on the dynamics between and interactions among private entities, public agencies, other governmental institutions, and the public at large. By using SDO standards, agencies and the public may gain from private sector creativity and expertise and save federal resources. But as with governmental contracting and other outsourcing decisions, the use of IBR rules raises important accountability challenges. These challenges can include reliance on partially closed processes and decision-making based on undisclosed data. Internal safeguards, such as an agency selecting (or not) particular privately drafted rules as appropriate for use, may not safeguard against poor standards that do not serve the public interest. Public access may thus be critical to ensure that the remaining accountability mechanisms are fully functional.

In short, as we redesign our governance mechanisms, fuller, more methodical attention to the public access needed for governmental accountability and notice is necessary. In the setting of IBR rules, the current system is very far from providing adequate public access. Widespread free access to the text of both proposed and final IBR rules, like that provided for agency-drafted rules, is critical to assure that agencies have properly adopted IBR rules and that those rules can be revised if need be.

Finally, we must consider the message the government sends by providing free access to IBR rules only in a Washington, D.C., reading room and acquiescing in private entities’ charging significant fees for access. The message is particularly striking at a time when Congress and the president have taken numerous efforts to open governmental workings and to dramatically increase digital access to governmental actions and information. Against the backdrop of a history of free, open access to American law, the use of IBR rules subject to significant restrictions—restrictions likely to preclude access to most ordinary citizens—sends a message that undermines our core democratic commitments to public governance and the idea of equal access to the law.

Federal regulatory actions may not sound as worrisome as particular surveillance decisions, but, as a group, they apply to the entire public—both more broadly and for an indefinite duration. These legislative and quasi-legislative actions are among the most significant powers exercised by the federal government. Access to the text of these rules cannot just be a formality; the text must be readily, meaningfully available to the public, including

383. See Jody Freeman, *Extending Public Accountability Through Privatization: From Public Law to Publicization*, in *PUBLIC ACCOUNTABILITY: DILEMMAS, DESIGNS AND EXPERIENCES*, *supra* note 227, at 83, 83–84.

substantial levels of access without charge. Whether such increased transparency in the form of meaningful public access will suffice for accountability in this collaborative governance setting is unclear,³⁸⁴ but it is the bare minimum.

384. See, e.g., McALLISTER, *supra* note 217, at 58 (describing use of an additional layer of private parties to oversee private accreditation of compliance with governmental standards such as organic food standards).

